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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 86-

VICKIE JEAN RATLIFF PECK,
individually and as Administratrix of the Estate of
HOLLEY MICHAEL RATLIFF, deceased, acting by
and through his heir at law and Administratrix,
Vickie Jean Ratliff,
Petitioners (Appellants Below),

vs.

THE M/V MORRIS HARVEY, M/V #265183,
a registered diesel towboat, MADISON COAL AND
SUPPLY, INC., a corporation, PRIVATE
PLEASURE BOAT WV, 7380, AB, a registered
small craft, PAUL KESSINGER,
Respondents (Appellees Below).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether failure to maintain a bow lookout in conditions of good visibility creates a mere rebuttable presumption of negligence, as ruled by the Fourth Circuit, or constitutes statutory fault, as ruled by all other federal circuits.

2. Whether the District Court violated the rule established by *Moragne vs States Marine Lines, Inc.*, 90 S Ct 1772, 398 U.S. 375, 26 L. Ed. 2d 339, by permitting a defense medical witness to refer extensively to West Virginia's state standards for *prima facie* intoxication in criminal cases and by refusing the petitioners' cautionary instruction which would correctly have advised the jury that plaintiff's decedent had committed no criminal offense under state or federal law by having a blood alcohol content of .022 while a guest passenger on a private pleasure boat.

PARTIES

The parties to this action in the United States District Court for the Southern District of West Virginia were Vickie Jean Ratliff Peck, individually and as executrix of the estate of her husband, Holly Michael Ratliff, deceased, plaintiffs and appellants below, and Madison Coal and Supply Company, M/V Morris Harvey, a registered diesel towboat, Private Pleasure Boat WV 7830 AB, a registered small craft, and Paul Kessinger, owner of Private Pleasure Boat WV 7830 AB, defendants and appellees below.

The petitioners on this petition for writ of certiorari are Vickie Jean Ratliff Peck, individually and as administratrix of the estate of Holley Michael Ratliff, deceased, and the estate of Holley Michael Ratliff, deceased, acting by and through his heir at law and Administratrix, Vickie Jean Ratliff.

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No.

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Respondents (Appellees Below).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS IN COURTS BELOW

The decision of the district court is not reported and is set forth at pages 7a thru 8a of the Appendix to this petition ("App. 7a-8a"). The Court of Appeals' Opinion is not reported and is set forth at Appendix pages 2a thru 6a ("App. 2a-6a").

GROUNDS OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit in this case was dated and entered March 24, 1986.

This Court has subject matter jurisdiction pursuant to 28 U.S. Code 1254, to review the judgment of the Court of Appeals by writ of certiorari granted upon timely petition of a party to a civil action, after rendering of judgment.

CONSTITUTIONAL PROVISIONS AND STATUTES

33 U.S. Code 221

221. Usual additional precautions required generally (article 29)

Nothing in these rules shall exonerate any vessel, or the owner or master of crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect *to keep a proper lookout* or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

(33 U.S. Code 221) (emphasis supplied)

West Virginia Code of 1931, as amended

Chapter 17C, Article 5A, Section 5

§17C-5A-5. Interpretation and use of chemical test.

Upon trial for the offense of driving a motor vehicle on the public streets or highways of this State while under the influence of intoxicating liquor, or upon the trial of any

civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving a motor vehicle while under the influence of intoxicating liquor, evidence of the amount of alcohol in the person's blood at the time of the arrest or of the acts alleged, as shown by a chemical analysis of his blood, breath or urine, is admissible, if the sample or specimen was taken within two hours from and after the time of arrest or of the acts alleged, and shall give rise to the following presumptions or have the following effect:

(a) Evidence that there was, at that time, five hundredths of one percent or less, by weight, of alcohol in his blood, shall be prima facie evidence that the person was not under the influence of intoxicating liquor;

(b) Evidence that there was, at that time, more than five hundredths of one percent and less than ten hundredths of one percent, by weight, of alcohol in the person's blood shall be relevant evidence, but it is not to be given prima facie effect in indicating whether the person was under the influence of intoxicating liquor;

(c) Evidence that there was, at that time, ten hundredths of one percent or more, by weight, of alcohol in his blood, shall be admitted as prima facie evidence that the person was under the influence of intoxicating liquor.

Percent by weight of alcohol shall be based upon milligrams of alcohol per one hundred cubic centimeters of blood.

A chemical analysis of a person's blood, breath or urine, in order to give rise to the presumptions or to have the effect provided for in subdivisions (a), (b) and (c) of this section, must be performed in accordance with methods and standards approved by the state department of health. A

chemical analysis of blood or urine to determine the alcoholic content of blood shall be conducted by a qualified laboratory or by the state police scientific laboratory, of the criminal identification bureau of the department of public safety.

The provisions of this article shall not limit the introduction in any administrative or judicial proceeding of any other competent evidence bearing on the question of whether the person was under the influence of intoxicating liquor. (1968, c. 35)

STATEMENT OF THE CASE

On Sunday, Labor Day weekend of August 31, 1980, at 2:00 A.M., the petitioners' decedent was a guest passenger on respondent Paul Kessinger's disabled pontoon boat, when it collided with the lead barge of M/V Morris Harvey's 595 foot tow, owned and operated by respondent Madison Coal and Supply Co., Inc. The collision occurred just two hours after the Coast Guard had lifted its ban on all commercial traffic on the Kanawha River, imposed due to Charleston, West Virginia's Labor Day regatta. As a result of the collision, two of respondent Kessinger's passengers drowned. The petitioners' evidence established without contradiction several essential facts:

Both of respondent Madison's two watchstanders, pilot Clyde Hammack, Jr., and deckhand/duty engineer Andrew Cogis, were stationed in the M/V Morris Harvey's pilot house, but neither man observed Kessinger's disabled pontoon boat by radar or visual lookout until after the collision. (Appendix, pages 24a & 30a). Both of Madison's watchstanders conceded that there was ample light available from streetlights and other sources to see even an

unlighted small boat drifting in the channel. (Appendix, pages 26a, 27a, 28a & 29a)

There was no lookout posted at the head of the M/V Morris Harvey's 595 foot tow, notwithstanding the repeated radio broadcast of a Coast Guard Notice to Mariners recommending such precaution to commercial towboat operators in congested areas during the Labor Day weekend. (Plaintiffs' Exhibit 22, Appendix page 18a)

Madison's deckhand, Andrew Cogis characterized traffic conditions on the river as "congested" even at 2:00 A.M. and reported that, immediately prior to the collision, there were large numbers of private boats zig-zagging across the river, running up and down river and anchored or moored along both banks. (Appendix page 32a)

At the time of the collision, there existed in front of M/V Morris Harvey's tow a blind spot, invisible to the pilot house, conceded by respondent Madison's expert witnesses to be 70 feet wide and 600 feet long (Appendix, pages 199 and 459). However, according to Coast Guard Captain Kenneth Hofstra's unrebutted calculations, M/V Morris Harvey's blind spot was 965 feet long; thus respondent Kessigner's entire pontoon boat, including its awning, would have disappeared from the view of lookouts in M/V Morris Harvey's pilot house some 200 feet ahead of the lead barge. The pontoon boat's running lights, assuming they were mounted four feet above water would have disappeared from the pilot house's view some 600 feet ahead of the lead barge. (Appendix, pages 41a, 44a, 45a)

The morning after the collision, the Coast Guard's investigator tested the pontoon boat's battery and running lights and found that its lights burned visibly in daylight. (Appendix, pages 36a, 38a)

ARGUMENT

I.

Whether failure to maintain a bow lookout in conditions of good visibility creates a mere rebuttable presumption of negligence, as ruled by the Fourth Circuit, or constitutes statutory fault, as ruled by all other federal circuits.

There exists a split of authority between the Fourth Circuit on one hand and all other federal admiralty circuits on the other as to whether failure to maintain a bow lookout constitutes a mere rebuttable presumption of negligence or a statutory violation of 33 United States Code 221 constituting negligence as a matter of law:

221. Usual additional precautions required generally (article 29)

> *Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect* to carry lights or signals, or of any neglect *to keep a proper lookout* or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

(33 U.S. Code 221) (emphasis supplied)

In the present case, the District Court charged the jury generally as to Madison's duty to maintain a proper lookout, but refused petitioner's motion for a directed verdict and refused petitioner a specific instruction requiring Madison to show that it posted a bow lookout or to justify in a compelling manner its failure to do so. The Fourth Circuit sustained the District Court, ruling as follows:

> *The requirement placed on a vessel operator to maintain a proper lookout does not necessitate, as a flat and unyielding obligation, the unvarying posting of a lookout in the bow of the forward barge. Osaka Shosen Kaisa, Ltd. v. Angelos, Leitch & Co.,* 301 F.2d 59, 61 (4th Cir. 1962) ("the question of the sufficiency of the lookout in any instance is one of fact, to be resolved under the attendant circumstances. . . ."). *Furthermore, breach of the duty to post "proper lookout" is not the equivalent of a statutory violation. E.A. Anthony v. International Paper Co.,* 289 F.2d 574, 580 (4th Cir. 1961).
>
> . . . . .
>
> Moreover, the furthest that the authorities go in support of the appellants' position is to hold that the failure to post a proper lookout raises an inference, albeit a strong one, imposing a burden on the operator of the vessel to demonstrate that any resulting breach of duty did not contribute to the accident. *District v. Lauritzen,* 404 F.2d 1001 (4th Cir. 1968); *Esso Standard Oil Co. v. Oil Screw Maluco I,* 332 F.2d 211, 213 (4th Cir. 1964)
>
> (Unpublished *Per Curiam* Decision decided March 24, 1986) (Emphasis supplied)

Contrary to the Fourth Circuit's ruling, the failure of M/V Morris Harvey to maintain a special lookout on the extreme forward barge of its tow should constitute statutory fault under the prior decisions of the United States Supreme Court. A powered vessel which fails to maintain a vigilant lookout at the extreme forward part of the vessel at night in a position best adapted to descry approaching vessels at the earliest possible moment is in fault, and the pilot house is not the proper place to maintain an effective lookout. (*St. John v. Paine* (1850) 51 U.S.

557, 13 L. Ed. 537); *The Tillicum* (1916) (CA9 Wash) 230 F. 415; *The Surf* (915) (D.C. Mass) 230 F. 485. A powered vessel proceeding up river in a narrow channel containing a fleet of river craft is at fault in failing to post, aside from the man at the wheel, a proper lookout at the forward part of the vessel. (*Newton v. Stebbins* (1850) 51 U.S. 586, 13 L. Ed. 551). Powered vessels navigating in thoroughfares of commerce must have constant and vigilant lookouts, properly positioned, and elevated positions such as hurricane decks are not as favorable as those near the vessel's stem. *Haney v. Baltimore Steam Packet Co.* (1860) 64 U.S. 287, 16 L. Ed. 562; *The Ottawa* (1866) 70 U.S. 268, 18 L.Ed. 165; *The Wanata* (1877) 95 U.S. 600, 24 L. Ed. 461. A competent lookout must be stationed at the vessel's bow whenever physically possible. *The Belgenland* (1885) 114 U.S. 355, 29 L. Ed. 152, 5 S. Ct. 860; *The Choctaw* (1921) (C.A. 6 Mich.) 270 F. 114; *The Campania* (1927) (D.C. La.) 21 F2d 233 (Steamship in fault for failing to place lookout as low and as far forward as possible) *A/S Skaugaas v. T/T P.W. Thirtle* (1964) (D.C. Md.) 227 F.S. 281 affirmed (C.A. 4 Md.) 345 F.2d 275, *cert. den.*, 382 U.S. 918, 15 L.Ed.2d 233, 86 S.Ct. 292 (The vessel should have maintained proper lookout forward where her bridge was 450 feet aft of her stem).

The District Courts, sitting in admiralty, have repeatedly found that tugs pushing tows do not constitute a special case exempt from posting a forward lookout. (*Clary Towing Co. v. Port Arthur Towing Co.* (1973) (E.D. Tex.), 367 F.S. 6). On the contrary, where a tug is pushing a sizeable tow, the lookout should be posted on the extreme forward portion of the tow. *The Edward G. Murray* (1916) (C.A. 2 N.Y.) 234 F.61; *Gulf Oil Corp. v. The Socony No. 16* (1947) (C.A. 2 N.Y.) 162 F.2d 869 (Barge liable for collision with tug where, had lookout been posted on lead

barge at time of collision, it was reasonable to believe that the other vessel would have been seen so that a timely signal could have been observed by a bow lookout); *The Pennsylvania* (D.C. N.Y.) F Case No. 10,949 (A lookout should be maintained on the tow, particularly where the tow projects well ahead of its tug); *The Lyndhurst* (1899) (D.C. N.Y.) 92 F. 681; *The Authentic* (1929) D.C. N.Y. 37 F.2d 352 (Tug at fault for proceeding at night with two loaded car floats projecting ahead of her without a lookout on the forward edge of its tow); *The LeHigh* (1935) (D.C. N.Y.) 12 F.S. 75 (When lead barge was located 800 feet ahead of the tug, the lead barge should have had a lookout stationed aboard); *Cocks v. The Tonawanda* (1880) (D.C. R.I.) 3 F. 588 (The absence of a watchman on the tow was a culpable omission).

Respondent Madison Coal Company cannot evade culpability by arguing that a forward lookout on its tow could not have seen the pontoon boat in time to avoid the collision. Both Madison's pilot and duty deckhand testified that there was plenty of light on the river to see unlighted small boats:

PILOT HAMMACK - REDIRECT

Q. Mr. Emch asked you that evening if you were putting the boat where you wanted it to go. *You saw a small boat between the Elk River and the South Side Bridge, did you not, sir?*

A. *Yes.*

. . . . .

Q. *He was out in the channel stationary?*

A. *Yes, he was.*

Q. And you stopped for him?

A. Yes.

Q. *And you had no trouble seeing him?*

A. *No, I didn't.*

(Appendix page 26a)
(emphasis supplied)

DECKHAND COGIS - DIRECT

Q. Do you remember what the reason was for stopping the tow at that point?

A. Yes, sir, there was a pleasure cruiser out in the middle of the river and just floating there with no lights on.

Q. *Were you able to see the pleasure cruiser with no lights on out in the middle of the river okay?*

A. *Yes, sir.*

Q. *Was there light on the water from various sources?*

A. *Yes, sir.*

Q. *Did the street lights along the banks of the river add to the reflection of light down on the surface?*

A. *Yes, sir they did.*

Q. *As far as you were concerned, was there adequate light to see by with the naked eye?*

A. *Yes, sir.*

Q. Were the weather conditions clear?

A. Yes, sir.

Q. Any fog at all?

A. No, sir.

Q. No rain, no drizzel (sic)?

A. No rain, no drizzel (sic), sir.

Appendix, page 28a,
page 29a,
(emphasis supplied)

It is well established that a vessel is in fault for a collision where even though it is night, with a proper lookout, the vessel struck could have been seen in time even though she showed no light. (*Cushing vs. Owners of The John Frazer* (1858) 62 U.S. 184, 16 L.Ed. 106; *The Ariadne* (1872) 80 U.S. 475, 20 L.Ed. 542; *The Verona* (D.C. Va.) 1933 AMC 169 (Steamer found in fault for failing to keep a proper lookout even where motorboat she ran down had no fixed stern light); *The Mercere* (1916) (C.A.2 N.Y.) 234 F.2d 59; *the O'Brien Bros.* (1919) (C.A.2 N.Y.) 258 F. 614 (Tug found at fault in colliding with motorboat for failing to maintain forward lookout where other observers on scene could see the hazard and a competent lookout on tug should have been able to see it also).

All aboard the pontoon boat who survived testified that she was showing running lights and the Coast Guard's investigation established that her running lights were in operating condition after the collision and that her battery carried sufficient charge to make them burn visibly in daylight. (Appendix, pages 26a, 36a).

LT. ARN HEGGERS, U.S. COAST GUARD - DIRECT

Q. You got to the scene of the accident what time in the morning?

A. At daylight. I don't recall specifically the time.

Q. *When you got there you tested the lights on board Mr. Kessinger's boat and the red and green running lights were operative?*

A. *Correct.*

(Appendix, page 36a).

LT. ARN HEGGERS, U.S. COAST GUARD - REDIRECT

A. All right. I understand and I want to make sure when you tested the running lights the red and green lights, *there was sufficient energy at the present time in the battery to make those lights burn?*

A. *Correct.* Now whether or not, like I say they met the requirements of the regulations as to distance and visibility, I don't know.

Q. Right. And you did this *but there was enough energy in the battery to make them light up and you to see this, even in the day time?*

A. *Right.*

(Appendix, page 38a)
(emphasis supplied)

The Fourth Circuit cases of *Esso Standard Oil Company v. Oil Screw Maluco I, supra, Chesapeake Bay Bridge and Tunnel District v. Lauritzen, supra,* and *Anthony v. International Paper Company, supra,* should be overruled and the Fourth Circuit's lookout requirement should be conformed to the status of statutory violation it is accorded in all other United States Circuits. In the case of *Anthony v. International Paper Company, supra,* the Fourth Circuit considered the following factual situation. A tug was proceeding toward port shortly after dark with only five men on board of its normal complement of seven men. Four of them were below at supper when the casualty occurred. Only the captain, who was piloting the tug, was on watch, and there was no lookout stationed at the head

of the tow. The tug's captain spotted a small boat about 250 feet off his port bow which he swamped with his wake, drowning all four persons on board. The Fourth Circuit expressly declined to follow the First, Second, and Fifth Circuits (See cases cited, *supra*) which make failure to post a bow lookout having exclusively lookout duties a non-rebuttable statutory fault:

> It is true that in numerous cases it has been held that a vessel in motion in a traveled area should have a lookout at the location on the vessel, *usually in the bow,* best suited to see and hear an approaching object *and that the lookout should have no other duties, particularly such as those which devolve upon the pilot or others on the bridge.* See the authorities assembled in *Osaka Shosen Kaisha, Ltd. v. The Elene,* D.C. Md., 190 F. Supp. 201.
> (*Anthony v. International Paper Company* (C.A.4, 1961) 289 F.2d 574 at page 580) (emphasis supplied)

The Fourth Circuit then attempted to distinguish extensive First, Second and Fifth Circuit caselaw making failure to post a proper forward lookout an absolute statutory fault. (*Zigler Co. v. Barker Barge Line* (C.A. 5), 167 F.2d 676; *Smith v. Bacon* (C.A. 5), 194 F.2d 203; *Parker Bros. & Co. v. DeForest* (C.A. 5), 221 F.2d 377; *Ulster Oil Transportation Corp. v. The Matton No. 20* (C.A. 2), 210 F.2d 106; *Ira S. Bushy & Sons v. United States* (C.A. 2), 172 F.2d 447; *Gulf Oil Corp. v. The Socony No. 16* (C.A. 2), 162 F.2d 869; *Afran Transport Co. v. The Bergechief* (C.A. 2), 274 F.2d 469; *Dwyer Oil Transport v. The Edna M. Matton* (C.A. 2), 255 F.2d 380. In reversing the lower court's rulings, in *Anthony,* the Fourth Circuit rationalized its rule as follows:

> We do not, however, *minimize the duty* of a vessel to have a proper lookout. On the contrary, we hold that the omission to perform this duty is so grave a default as to give rise to a strong inference that it contributed to the accident and to impose upon the vessel the heavy burden to show by clear and convincing evidence that it did not so contribute. Such a holding is surely justified in view of the more drastic rule laid down by experienced admiralty courts as a necessary safeguard for careful navigation. Accordingly, the jury should have been instructed in the pending case that if they found that the lookout duty was not properly performed by the tug, the burden rested upon it to exculpate itself from liability. (*Anthony v. International Paper Company* (C.A.4 1961) 289 F.2d 574 at page 581)

In the later case of *Esso Standard Oil Company v. Oil Screw Tug Maluco I,* the Fourth Circuit followed *Anthony,* again distinguishing the extensive caselaw of the First, Second and Fifth Circuits. *Esso Standard Oil Company v. Oil Screw Maluco I* (C.A. 4 1964) 332 F.2d 211. in *Esso Standard,* the night was clear, the vessels in plain view of each other for more than two miles, and each showed proper navigational lights. The tanker had failed to post a bow lookout and was extensively using her searchlight just before and just after transiting the strait. The tug claimed the tanker's searchlight blinded the tug's pilot until just before the collision. The tug had failed to post a lookout on the forward end of her tow. The Fourth Circuit made the following concession regarding the absence of a forward lookout on the tow:

> With the liability of the tanker admitted, the next inquiry is the behavior of the tug. *She was at fault in many respects, but none so flagrant as*

> *the absence of a special lookout on the scow* or at least in not otherwise providing sufficient observation when nearing the dam.
> (*Esso Standard Oil Company v. Oil Screw Tug Maluco I*) ((C.A. 4 1964) 332 F.2d 211 at page 213) (emphasis supplied)

The Court quoted with approval language from *Anthony v. International Paper Company, supra,* to the effect that failure to post a bow lookout in that case was so grave a default as to give rise to a strong inference that it contributed to the collision and shifted to the delinquent vessel the burden of showing by clear and convincing evidence that its failure to maintain a proper bow lookout did not contribute to the collision. The Court conceded that the absence of a special lookout on the tug's scow was a grievious deficiency which sorely limited the tug's vision:

> With this limited vision (*i.e.,* no special lookout on her scow) the tug was not able to keep the vigil contemplated by the requirements of a "proper lookout." *A myopic tug with a protruding and displaced tow had no place in a narrow channel at midnight.* (Id. at page 214) (emphasis supplied) (parenthetical insertion made by petitioner herein)

In the present case, the respondent Madison Coal and Supply Company contended that its failure to post a bow lookout was excused because respondent Kessinger's pontoon boat lacked lights, a matter in vigorous contention. Even if this were so, both Madison's watchstanders admitted that there was sufficient visibility from the highway lights lining the Kanawha River to detect an unlighted pleasure boat drifting in the channel. (Appendix, pages 26a, 27a, 28a)

The United States Supreme Court has found a vessel to

be in fault for colliding with a vessel showing no lights where a properly efficient lookout should have seen the unlighted vessel in time to avert the collision. *Cushing v. Owners of The John Fraser* (1858) 62 U.S. 184, 16 L.Ed. 106; *The Ariadne* (1872) 80 U.S. 475, 20 L.Ed. 542. In the *O'Brien Bros.*, a tug was found at fault after colliding with a motorboat for not maintaining an efficient lookout where other observers on the scene were able to see the hazard and a competent lookout, properly stationed, should have been able to see the hazard while collision was still avoidable. The *O'Brien Bros.* (1919) C.A.2 N.Y.) 258 F.614); see also *The Verona* (D.C. Va.) 1933 AMC 169. The pilot and duty deckhand of M/V Morris Harvey, stationed on the port and starboard wings of the enclosed bridge, both admitted that they did not detect Kessinger's boat, either visually or by radar, until after the collision. (Appendix, pages 24a and 32a).

Where there is nothing to interfere with vision, the fact that the other vessel is not seen is all that is necessary to impute negligence to the lookout. (*Central Navigation Corporation of Monrovia, owner of S.S. Georgel, Libellant, v. M/V Atlantic Sun and Oil Company,* 245 F.S. 537 at page 545; see also *The Pavonia,* 26 F. 106 (S.D.N.Y.) (1885). See also Judge Boreman's dissenting opinion in the Fourth Circuit case of *Dalldorf v. Higgerson-Buchanan, Inc.* (C.A. 4 1968) 402 F.2d 419 at page 424; *The Mercere* (1916) (C.A.2 N.Y.) 234 F. 259 (Vessel at fault for not seeing approaching vessel until within 600 feet where there was no fog or falling snow to obscure visibility).

Petitioners were entitled to Plaintiff's Requested Charges #4, #9, instructing the jury that, under the circumstances of this case, Defendant Madison's failure to obey the Coast Guard Notice to Mariners by posting a lookout at the head of its tow constituted negligence proximately

contributing to the collision. (Appendix, pages 14a, 15a, 16a).

In the present case M/V Morris Harvey collided with defendant Kessinger's drifting boat on the right front quarter of its tow, an area within the lookout responsibility assumed by pilot Clyde Hammack, who was stationed on the right side of the pilothouse oberving the radar screen and performing pilot's duties while deckhand Andrew Cogis was stationed on the left side of the pilot house observing the port side of the tow. (Appendix, pages 31a and 32a.)

A helmsman or person stationed on the bridge or in the pilot house is not a proper lookout. *The Ottawa* (1866) 70 U.S. 268, 18 L.Ed. 165; *The Captain Weber* (1898) (C.A. 9 Cal.) 89 F. 957; *The Pilot Boy* (1902) (C.A. 4 S.C.) 115 F. 873; *Dahlmer v. Bay State Dredging and Contracting Co.* (1928) (C.A.1 Mass.) 26 F.2d 693; *The Henry C. Rowe* (D.C. N.Y. 1982 AMC 1624, affirmed (C.A.2 N.Y.) 35 F.2d 742. And a tug with a tow does not comply with 33 U.S. Code 221 simply because the officer in charge looks out from the pilot house. (*Intagliata v. Shipowners and Merchants Towboat Co.* (1945) 26 Ca. 2nd 365, 159 P.2d 1) In *Anthony v. International Paper Company,* the captain of the tug served as its sole lookout from its enclosed pilot house while also performing the duties of pilot and helmsman (*Id.*, at page 576-577), the rest of the crew being at supper. On appeal, the plaintiff vigorously contended that the pilot or helmsman could not, as a matter of law, simultaneously perform the duties of a lookout and the duties of helmsman/pilot from the pilot house. Following its non-statutory fault rule, the Fourth Circuit looked to the facts of the case, noting the following factors which it said made a jury question of the adequacy of the tug's lookout:

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> There was, in the first place, the testimony of the master of the tug that there was fair visibility ahead of his vessel and yet he did not see the motorboat until it was almost abreast the bow of the tug on the port side. He stressed the failing light between sunset and dark prevailing at the time and the difficulty of seeing the unlighted boat against the background of the river bank; but testimony given on behalf of the plaintiff showed that it was still possible to see an unlighted object on Sandy Island one and a half miles away.
> (*Anthony v. International Paper Company* (C.A.4 1961) 289 F.2d 574 at page 579)

The Fourth Circuit ruled in *Anthony* that the District Court correctly refused to instruct the jury that the duty to post a sufficient lookout was inadequately performed, since it was undertaken by the master of the tug in addition to other duties; it found, however, that the lookout instruction actually given by the District Court did not adequately focus the jury's attention upon the tug's duty to maintain a proper lookout:

> Accordingly, the jury should have been instructed in the pending case that if they found that the lookout duty was not properly performed by the tug, the burden rested upon it to exculpate itself from liability. *The failure to give such a charge was particularly prejudicial in the present case, because the attention of the jury was not specifically called by the judge to the fact that the tug did not have an independent lookout* . . . (*Id.* at page 581) (emphasis supplied)

This is exactly the situation in the present case, since the jury was given no more than a general idea of respondent Madison Coal Company's duty to maintain an "adequate

lookout." Compare the Fourth Circuit's relaxed view toward bow lookouts with that of the Second Circuit in *Complaint of Interstate Towing Company v. Stissi,* in which the Second Circuit made the following stern oberva-tion:

> *It is axiomatic that an "inefficient lookout is equivalent to none." Sun Oil Co. v. S.S. Georgel,* 245 F. Supp. 537, 545 (S.D. N.Y. 1965) aff'd 369 F.2d 406 (C.A. 2 1966) (*per curiam*) See the *Robert H. Inc. v. The Socony No. 19,* 162 F.2d 199, 200 (C.A.2 1947) *A proper lookout is one that is vigilantly maintained by a competent person of suitable experience. Chamberlain v. Ward.* 62 U.S. (21 How.) 548, 570, 16 L.Ed. 21 (1859); *Tug Ocean Prince, Inc. v. United States,* 584 F.2d 1151, 1159-1160 (C.A.2 1978) cert. den. 440 U.S. 959, 99 S.Ct. 1499, 59 L.Ed.2d 772 (1979); *In re Flota Mercante Grancolombiana, S.A.,* 440 F. Supp. 704, 715-17 (S.D. N.Y. 1977) . . . *The need for competent vigilance has prompted repeated holdings that a lookout's sole duty should be that with which he is charged and that one who is assigned the duties of helmsman is not a proper person to act as a lookout. Chamberlain v. Ward, supra,* 62 U.LS. at 571, 16 L. 1Ed. 211; *Tug Ocean Prince, Inc. v. United States, supra,* 548 F.2d at 1159-60; *The Pilot Boy,* 115 F. 873, 875 (C.A.4 1902) (*Complaint of Interstate Towing Co. v. Stissi*) (C.A.2 1983) 717 F.2d 752 at page 755. (emphasis supplied)

The Fourth Circuit readdressed the issue of lookouts having other duties in the case of *United States v. S.S. Soya Atlantic,* in which it justified its non-statutory fault rule as follows:

> They (plaintiffs) find fault with the Soya Atlantic on the ground that her lookout, engaged in securing the ladder which had been used by the pilot to go over her side, had not returned to his post, while the Soya Atlantic's Master, her First Officer and her helmsman, along on her bridge, had navigational duties as well as duties of lookout. *The District Court found, however, that the Darby was not unobserved from the Soya Atlantic and that everything was done which would have been done if the lookout had been at his post* adding his observation to that of the Captain and the First Officer. (*United States v. S.S. Soya Atlantic)* (C.A.4 1964) 330 F.2d 732 at page 735 (emphasis supplied))

The Fourth Circuit went on to observe by footnote that "The absence of a lookout having no other duties is not a basis for a finding of fault if the bridge actually observed what a lookout should have seen." (Citing *Osaka Shosen Kaisha Ltd. v. Angelos, Leich & Co., Ltd.* (C.A.4), 301 F.2d 59 at page 61) This sword cuts two ways in the present case. Since the pilot and watchman of M/V Morris Harvey admittedly did *not* observe what a proper bow lookout should have seen had one been posted, their failure to post such an independent forward lookout should have constituted fault. In the present case, the Coast Guard repeatedly promulgated by radio a Notice to Mariners which expressly recommended that commercial towboat operators post lookouts at the heads of their tows while transiting congested areas during the Labor Day weekend. Respondent Madison posted no bow lookout and neither deckhand Andrew Cogis, stationed on the port side of the pilot house, nor pilot Clyde Hammack, stationed to starboard in the pilot house, saw respondent Kessinger's boat until after the collision. A bow lookout, had

one been posted, would have been located more than 595 feet ahead of the pilot house and would consequently have had a 595 foot advantage over the tug's pilot in observing Kessinger's derelict boat. Furthermore, a bow lookout would have been able to see into the M/V Morris Harvey's blind spot, admitted by Madison's own expert witness to be 600 feet long while Coast Guard Captain Kenneth Hofstra proved to a mathematical certainty that the blind spot was over 965 feet long. These matters are physical facts which cannot reasonably be disputed and they are true not just in the present case on its peculiar facts, but in *every* case in which a tug pushes a lengthy tow ahead of it, the more so where the tow consists of empty barges riding high in the water.

II.

Whether the District Court violated the rule established by *Moragne v. States Marine Lines, Inc.*, 90 S.Ct. 1772, 398 U.S. 375, 26 L.Ed. 2d 339, by permitting a defense medical witness to refer extensively to West Virginia's state standards for *prima facie* intoxication in criminal cases and by refusing the petitioners' cautionary instruction which would correctly have advised the jury that petitioners' decedent had committed no criminal offense under state or federal law by having a blood alcohol content of .022 while a guest passenger on a private pleasure boat.

There was no evidence offered that petitioners' decedent's alleged intoxication as a guest passenger proximately caused or contributed to the collision of M/V Morris Harvey and Private Pleasure Boat WV 7830 AB. There was utterly no evidence of intoxication of petitioners' decedent from those who observed him before the collision; in fact, the uncontracdicted evidence of all pas-

sengers on the pontoon boat was that he was fully rational, coherent, and coordinated and that he observed the approaching barges and assisted in attempting to paddle the pontoon boat out of danger.

The District Court should not have allowed Dr. Irvin Sopher to testify that petitioners' deceased was "legally impaired and intoxicated to operate a motor vehicle" according to West Virginia's *prima facie* statutory criminal standards for determining intoxication of motor vehicle operators. (West Virginia Code of 1931, Chapter 17C, Article 5A, Section 5)

Over the petitioners' vigorous objection, Dr. Sopher was allowed to testify to the effect that petitioners' decedent was "legally too drunk" to operate a motor vehicle under West Virginia criminal law. Sopher was also permitted, over the petitioners' objections, to refer repeatedly to the West Virginia motor vehicle operators' *prima facie* criminal standards for determining intoxication (W.V. Code 17C-5A-5) in testifying that the deceased was under the influence of alcohol:

> DOCTOR SOPHER:
> All right .22 percent represents over twice the amount of alcohol allowed *under the law in the State of West Virginia whereby one can operate a motor vehicle without being considered impaired* to operate such a motor vehicle. And that is if a person has a point 10 percent, point 10 percent or greater alcohol in their bodies *while operating a motor vehicle, then they, if arrested and tried are legally impaired and intoxicated* to operate a motor vehicle, that is point 10 percent. In this particular, this is not a motor vehicle situation, but the blood showed an alcohol level in Mr. Ratliff of .22 percent, which is over twice as

> much alcohol in the blood of Mr. Ratliff. *And if he had been driving a motor vehicle, which, of course he wasn't, he would be considered intoxicated, to say the least.*
> (Appendix, pages 46a, 47a)
> (emphasis supplied)

Parenthetically, the West Virginia code section referred to by Dr. Sopher does not apply to boats or watercraft of any kind. (17C-5A-5, West Virginia Code of 1931)

The trial court's rationale in allowing Dr. Sopher's inflammatory testimony regarding "arrests," "trials," and "legal impairment" was that it would "illustrate the meaning" of the decedent's blood alcohol level; (Appendix, page 47a, page 48a) however, the testimony wrongly suggested to the jury that the deceased had committed a criminal act under West Virginia law by being intoxicated and further suggested that the deceased was therefore somehow responsible for the operation or control of Kessinger's derelict pontoon boat when, in fact, he was a guest passenger. Dr. Sopher returned to West Virginia's motor vehicle criminal standards for determining *prima facie* intoxication several times in his testimony, thereby grafting onto the federal body of admiralty law an individual state's standards for determining criminal culpability.

Attempting to minimize the effect of this injection of West Virginia substantive law into the proceedings, petitioner took the trial court at its word and offered Plaintiiffs' Requested Charge No. 15, which would have instructed the jury that the West Virginia motor vehicle operators' *prima facie* standards for criminal intoxication were offered by respondent Madison Coal and Supply Company only for illustrative purposes and that West Virginia's criminal standards for legal intoxication do not

apply to passengers or operators of vessels on the Kanawha River, or any other navigable river of the United States.

PLAINTIFF'S REQUESTED CHARGE NO. 15

The Court instructs the jury that, in considering the testimony of Doctor Irvin Sopher and the other evidence and testimony in this case, there is no West Virginia law or regulation and no United States law or regulation which forbids or regulates the consumption of beer or other alcoholic beverage on a navigable river such as the Kanawha River, either by a passenger on a boat or vessel or by the owner or operator of a boat or vessel. In particular, the West Virginia motor vehicle laws have no applicability to a boat or vessel on the waters of the Kanawha River. Doctor Sopher was permitted to refer to the West Virginia motor vehicle laws regarding consumption of alcoholic beverages by the operators of motor vehicles merely for purposes of comparison or illustration and you should draw no inference whatsoever that such laws apply to Holley Michael Ratliff or any other passenger on Paul Kessinger's pontoon boat nor to Paul Kessinger himself, the owner and operator of the pontoon boat.

(Appendix, page 17a)

The trial court erred first in allowing Dr. Sopher's testimony and second in refusing the petitioner's requested cautionary instruction. This violated the clear mandate of *Moragne v. States Marine Lines Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 32 L.Ed.2d 679, by allowing West Virginia's criminal laws to become the standard for judging federal civil liability in a pure admiralty case.

CONCLUSION

It is impossible to justify the Fourth Circuit's decision in *Anthony v. International Paper Company* from the standpoint of public policy. If Madison Coal Company's deckhand had been stationed on the M/V Morris Harvey's lead barge with his two-way radio, rather than in the pilot house where he could drink coffee and chat with the pilot, this collision could have been avoided and two lives would have been spared. Madison Coal Company cannot argue that the hazard was not foreseeable, since the Coast Guard foresaw it and published a Notice to Mariners recommending the posting of bow lookouts on commercial tows. Lengthy blind spots ahead of large tows, invisible to the pilot house, are a maritime fact of life, easily corrected by posting a bow lookout. The present case clearly demonstrates that commercial towboat operators will not take such routine precautions unless they are compelled to do so. The arguable slight additional risk to the deckhand being posted on the tow is easily minimized by inexpensive equipment and a modicum of training. It is uncontroverted that M/V Morris Harvey's watchstanders utterly failed to observe Kessigner's disabled pontoon boat, either visually or by radar, as they must have done had they posted even the most perfunctory of bow lookouts. *Anthony v. International Paper Company* should be overruled as a precedent in favor of the rule of statutory fault followed by all other federal admiralty circuits.

The grossly inflammatory testimony of Madison Coal Company witness, Dr. Irvin Sopher, regarding criminal "arrests," criminal "convictions," and West Virginia's "legal standards for intoxication" injected West Virginia substantive criminal law into this federal admiralty proceeding, materially misleading the jury and making the petitioners' decedent's alleged intoxication the entire focus of the defense.

The petitioner are entitled to a directed verdict of liability against respondent Madison Coal and Supply Company based upon Madison's statutory fault in ignoring the Coast Guard Notice to Mariners by neglecting to post a forward lookout or, at the very least, to a new trial with a proper charge to the jury based upon the better rule that failure to post a special forward lookout constitutes statutory fault.

Respectfuly submitted,

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May 23, 1986

FILED
MAY 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

85 - 1927
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VICKIE JEAN RATLIFF PECK,
individually and as Administratrix of the Estate of
HOLLEY MICHAEL RATLIFF, deceased, acting by
and through his heir at law and Administratrix,
Vickie Jean Ratliff,
Petitioners (Appellants Below),

vs.

THE M/V MORRIS HARVEY, M/V #265183,
a registered diesel towboat, MADISON COAL AND
SUPPLY, INC., a corporation, PRIVATE
PLEASURE BOAT WV, 7380, AB, a registered
small craft, PAUL KESSINGER,
Respondents (Appellees Below).

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1206

Vickie Jean Ratliff Peck, individually and as administratrix of the estte of Holley Michael Ratliff, deceased and the Estate of Holley Michael Ratliff, deceased, acting by and through his heir at law and administratrix, Vickie Jean Ratliff,

Appellants,

versus

The M/V Morris Harvey, M/V #265183, a registered diesel tugboat; Madison Coal and Supply, Inc., a corporation; Barge #C-239, (O.N. 503271), a registered hopper-freight barge; Private Pleasure Boat WV 7830 AB, a registered small craft; Paul Kessinger and Clyde Hammack, Jr.,
Appellees,

and

Crounse Corporation, a corporation,

Defendant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Dennis R. Knapp, Senior District Judge. (C/A 82-2441).

Argued: February 4, 1986 Decided: March 24, 1986

Before MURNAGHAN and ERVIN, Circuit Judges, and KELLAM, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Steven L. Miller for Appellants; A.L. Emch (Robert L. Stewart; W. T. Shaffer; Jackson, Kelly, Holt and O'Farrell on brief) for Appellees.

PER CURIAM:

The facts of the appeal arouse sympathy for the plaintiffs, the widow of Holley Michael Ratliff suing in several guises, individually and as personal representative. However, the plaintiffs had their full day in court before a jury which, properly charged, the instructions considered as a whole, found in favor of the principal defendant.[1] As for the other defendant,[2] the plaintiffs complain on appeal of the verdict obtained against him as inadequate in amount.

Ratliff, plaintiffs' decedent, put forth in Charleston, West Virginia on the Kanawha River at or shortly before

[1]That is Madison Coal and Supply, Inc. References to it will be deemed to encompass Clyde Hammack, Jr., an employee of Madison, and Crounse Corporation, the owner of a barge under Madison's control.

[2]Paul Kessinger

2:00 A.M. on August 31, 1980, the Sunday of the Labor Day weekend. He did so in a pontoon boat, 24 feet long and 8 feet wide. Not under power, drifting downstream, the pontoon boat found itself in a position of imminent danger of collision with the lead barge in a tow of five being pushed upriver by a tug owned by Madison. An already distressing situation became worse when Kessinger, the owner-operator of the pontoon boat, was unable to start the engine. In the ensuing collision, and its immediate aftermath, Ratliff drowned. His alcoholic blood level at autopsy was .22% by weight, considerably above the .10% which West Virginia defines as *prima facie* evidence that an individual driving an automobile is under the influence. W.Va. Code § 17-C-5–8.

Despite the plaintiffs' contention to the contrary, they were not entitled to a directed verdict against Madison as to liability, and the jury instructions did not incorrectly submit the case. A directed verdict is inappropriate where the evidence suffices to raise a jury question of material fact. *Bryan v. Merrill, Lynch, Pierce, Fenner & Smith,* 565 F.2d 276, 281 (4th Cir. 1977); *Wratchford v. S.S. Groves & Sons Co.,* 405 F.2d 1061, 1066 (4th Cir. 1969).

Plaintiffs' contention that there was a violation by the tow of the duty under 33 U.S.C. § 210 to stay to starboard affords no substantial basis for a grant of a directed verdict. The evidence of just where in the river the tow and the tug were located was by no means clear and convincing, nor was there proof that the channel was narrow at the point of the collision, a requirement of 33 U.S.C. § 210.[3] Moreover the contention does not merit our atten-

[3] In narrow channels every steam vessel shall, when it is safe and practicable keep to that side of the fairway of mid-channel which lies on the starboard side of such vessel.

33 U.S.C. § 210. That statute was repealed, effective December 24, 1981. However, its function was assumed by replacement legislation, 33 U.S.C. § 2009.

tion, in any event, having for the first time been introduced at the appellate level and there being no exceptional circumstances to excuse the raising of the issue at the trial level. *Babb v. Olney Paint Co.*, 764 F.2d 240, 244 (4th Cir. 1985).

The requirement placed on a vessel operator to maintain a proper lookout does not necessitate, as a flat and unyielding obligation, the unvarying posting of a lookout in the bow of the forward barge. *Osaka Shosen Kaisha, Ltd. v. Angelos, Leitch & Co.*, 301 F.2d 59, 61 (4th Cir. 1962) ("the question of the sufficiency of the lookout in any instance is one of fact, to be resolved under the attendant circumstances . . . ."). Furthermore, breach of the duty to post "proper lookout" is not the equivalent of a statutory violation. *E.A. Anthony v. International Paper Co.*, 289 F.2d 574, 580 (4th Cir. 1961). Appellant's expert acknowledged that there is no rule or requirement mandating a lookout at the head of the tow.

Moreover, the furthest that the authorities go in support of the appellants' position is to hold that the failure to post a proper lookout raises an inference, albeit a strong one, imposing a burden on the operator of the vessel to demonstrate that any resulting breach of duty did not contribute to the accident. *District v. Lauritzen,* 404 F.2d 1001 (4th Cir. 1968); *Esso Standard Oil Co. v. Oil Screw Maluco I,* 332 F.2d 211, 213 (4th Cir. 1964).

Consequently, the matter remained one of fact. Since it was a disputed one, a directed verdict was not called for. The evidence indicated that the tug maintained as lookouts on the bridge the helmsman on the starboard side and the deck engineer on the port. Both were attending to their lookout duties at the time of the collision.

Turning to the claim that evidence of Ratliff's intoxica-

tion was improper, it is evident that, in such a state, Ratliff was foolhardy to have placed himself in the position he was in. The jury could properly infer that, conscious when he fell or was knocked overboard, he would have survived were it not for the diminished capacity induced by the influence of alcohol.

Accordingly, we are satisfied that the district court acted well within its discretion, insofar as Madison was concerned, in denying a directed verdict, a judgment N.O.V. or a new trial.

As for the supposed inadequacy of the damages allowed against Kessinger wee are troubled by the fact that he appeared *pro se* at trial, and took no part in briefing and arguing the appeal. At the same time, the indications are there that attacking the problem may prove, pragmatically if not legally, a futile exercise on our part. Nevertheless, the award has evident defects, being, within pennies, exactly 25% of the funeral expenses of $1,965.66, or $491.40. Kessinger had been deemed 25% responsible fo the fault, Ratliff, 75%.

The award in other words was infinitesimally less (by 1-1/2 cents) but, nevertheless, less than the proportionate share of funeral expenses for which Kessinger was liable. Unless we accept the improbability that actually some of the damages awarded against Kessinger concerned his special damages and not the funeral expenses, that left no damages whatever for anything save funeral expenses. We are most reluctant to opine that Ratliff was worth as much or even 1-1/2 cents more dead than alive. In the customary case, therefore, we should be disposed to find that there had been an abuse of discretion in the failure to grant a new trial against Kessinger, limited to damages, with the allocation remaining fixed at 75% of the fault attributable

to Ratliff, 25% to Kessinger. *Cf.* 6A *Moore's Federal practice* ¶ 59.08[6] pp. 59-179-181.

However, there is a genius behind the common law's insistence on approaching matters, even, or perhaps sometimes especially, matters of principle, one at a time. Kessinger had appeared at trial *pro se.* The attention spent on him was scant, as evidenced by the fact that appellant's combined motions for directed verdict, for judgment notwithstanding verdict, and for a new trial only, as a matter of ritual, devoted but six lines out of five full pages to "the further and additional grounds that the damages awarded by the jury, being the stipulated necessary and reasonable funeral bills of the plaintiffs' decedent and being less than the uncontradicted special damages proved by plaintiffs are clearly inadequate as a matter of both law and fact."

The assessment by counsel for Madison of Kessinger as presenting himself to the jury at trial as a man without significant financial resources has gone uncontradicted by appellants. That does not suffice as a reason for the jury to reduce its assessment of damages to the vanishing point. No more could the jury properly have refused any damages because of the fact that Ratliff's widow remarried within six months of the fatal accident. Still those considerations may properly have influenced a busy district judge not to engage the limited resources of an overextended court in trying a case in which, whatever the outcome, it would, as a practical matter, have little or no significant effect. With some hesitancy, therefore, we conclude that the district judge, clearly within his discretion in denying a new trial against Madison, did not abuse it in refusing to resurrect the damages issue with respect to Kessinger.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

No. 85-1206

VICKIE JEAN RATLIFF PECK, Individually and as administratrix of the estate of HOLLEY MICHAEL RATLIFF, deceased and the Estate of HOLLEY MICHAEL RATLIFF, deceased, acting by and through his heir at law and administratrix, Vickie Jean Ratliff,

ENTERED

AUG 14 1984
ORDER BOOK
NO 112 PAGE 58

Plaintiffs,

Vs. Civil Action No. 82-2441,

THE M/V MORRIS HARVEY, M/V #265183, a registered diesel tugboat, MADISON COAL AND SUPPLY, INC., a corporation, BARGE # C0239, (O.N. 503271), a registered hopper-freight barge, PRIVATE PLEASURE BOAT WV 7830 AB, a registered small craft, PAUL KESSINGER, CLYDE HAMMACK, JR.,

Defendants.

JUDGMENT ORDER

This action came on for trial before the Court and a jury, Honorable Dennis R. Knapp presiding, and the

issues having been duly tried and the jury having duly rendered its verdict,

It is ORDERED and ADJUDGED that the plaintiffs, Vickie Jean Ratliff Peck, Individually and as administratrix of the estate of Holley Michael Ratliff, deceased, and the estate of Holley Michael Ratliff, deceased, acting by and through his heir at law and administratrix, Vickie Jean Ratliff, recover of the defendant, Paul Kessinger, the sum of $491.40, with interest thereon at the rate of 11.93% as provided by law, and plaintiffs' costs of action.

Further, it is ORDERED and ADJUDGED that the plaintiffs take nothing from defendant, Madison Coal and Supply, Inc., and that Madison Coal and Supply, Inc., recover of the plaintiffs its costs of action.

It is further ORDERED that this action be dismissed with prejudice and stricken from the docket.

The Clerk is directed to mail certified copies of this order to counsel of record herein.

DATED: August 13, 1984

/s/

DENNIS R. KNAPP, JUDGE

A TRUE COPY, Certified this
15th day of August 1984
RONALD D. LAWSON, CLERK

By_____
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
WEST VIRGINIA AT CHARLESTON

No. 85-1206

VICKIE JEAN RATLIFF PECK, Individually and as administratrix of the estate of HOLLEY MICHAEL RATLIFF, deceased and the Estate of HOLLEY MICHAEL RATLIFF, deceased, acting by and through his heir at law and administratrix, Vickie Jean Ratliff,

Plaintiffs,

Vs. Civil Action No. 82-2441,

THE M/V MORRIS HARVEY, M/V #265183, a registered diesel towboat, MADISON COAL AND SUPPLY, INC., a corporation, BARGE #C-239, (O.N. 503271), a registered hopper-freight barge, CROUNSE CORPORATION, a corporation, PRIVATE PLEASURE BOAT WV 7830 AB, a registered small craft, PAUL KESSINGER, CLYDE HAMMACK, JR.,

Defendants.

FILED
AUG 13 1984
IN CLERK'S DIST. of W.VA.
Ronald D. Lawson, Clerk

PLAINTIFFS' MOTION FOR DIRECTED VERDICT MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT MOTION FOR A NEW TRIAL

TO MADISON COAL AND SUPPLY, INC., a corporation, and ALVIN L. EMCH, its counsel of record and PAUL KESSINGER, JR., acting *pro se*

Pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, the plaintiffs hereby renew their motion for a directed verdict made in open court at the close of the evidence offered by the defendants Paul Kessinger and Madison Coal and Supply, Inc. and further move the Court pursuant to Rule 50(b) of the Federal Rules of Civil Procedure for judgment notwithstanding the verdict, all on the grounds that the plaintiffs' evidence established without contradiction that the defendant Madison Coal and Supply, Inc., failed to post a bow lookout upon the head of their tow while transiting the congested waters of the Kanawha River at its confluence with the Elk River, the docking areas between the City of Charleston levee and the C & P Telephone Company dock and boat ramp, that defendant Madison through its agents and employees, by such employees' own admission, failed to detect the boat in which plaintiffs' decedent was a passenger, with the result that a collision occurred between plaintiffs' decedent's said boat and defendant Madison's tow. Defendant Madison offered no explanation or excuse for its failure to post such bow lookout and defendant Madison's omission to perform its duty to post a bow lookout is so grave a default as to give rise to a strong inference that it contributed to the collission and to impose upon defendant Madison and its vessel, M/V Morris Harvey, the heavy burden to show by clear and convincing

evidence that said defendant's failure to post a bow lookout did not contribute to cause the collision, which burden defendant Madison wholly failed to meet.

(See Chesapeake Bay Bridge and Tunnel District v. Lauritzen (CA 4 1968) 404 F.2d 1001 at pages 1001 and 1007; Anthony v. International Paper Company (CA 4 1961) 289 F.2d 574 at page 581; Esso Standard Oil Company v. Oil Screw Tug Maluco I (CA 4 1964) 332 F.2d 211) Since defendant Madison failed to meet its heavy burden and failed to produce clear and convincing evidence, or any evidence whatsoever, justifying or excusing its failure to post a bow lookout, the plaintiffs are entitled to judgment against defendant Madison Coal and Supply, Inc., as a matter of law. By way of further grounds for plaintiffs' said motions for directed verdict and judgment notwithstanding the verdict, plaintiffs hereby urge the Court that the plaintiffs' uncontradicted evidence established that, prior to the collission, defendant Madison failed to post as lookout any person having exclusively lookout duties. In particular, the pilot of M/V Morris Harvey testified that he served as starboard lookout from the pilot house while piloting the M/V Morris Harvey, operating its rudder and throttle controls, operating its searchlight, monitoring the dials and gauges of its console, monitoring its radar and radio, making log entries and otherwise performing numerous functions beside that of lookout. Such failure of M/V Morris Harvey to maintain a proper lookout was, a matter of law, an effective contributing cause of the collision which occurred on the starboard front quarter of the head of M/V Morris Harvey's tow, as to which area pilot Clyde Hammack, Jr., had, as aforesaid, unlawfully charged himself with the responsibility of acting as lookout. Defendant Madison's failure to post a proper starboard lookout (or port lookout for

that matter) having exclusively lookout duties entitles plaintiffs to judgment against defendant Madison as a matter of law. See Interstate Towing Co. etc. et al. vs. Stissi (CA 2 1983) 717 F.2d 752 at page 754-]755; Faust vs. South Carolina State Highway Deparetment et al. (CA 4 1983) 721 F.2d 934 at page 947; U.S.A., owner of USS Darby vs. SS Soya Atlantic (CA 4 1964) 330 F.2d 732 at pages 732 and 735.

For the foregoing reasons and for other reasons hereinafter set forth, plaintiffs further move the Court pursuant to Rule 59 of the Federal Rules of Civil Procedure for a new trial on the issues of liability and damages as to both Madison Coal and Supply Company, Inc., and Paul Kessinger on the grounds that the foregoing errors of law prejudiced the plaintiffs in the presentation of their case against Madison Coal and Supply Company, Inc. to the jury. In support of their motions, plaintiffs urge the further and additional grounds that the Court's error in failing to grant paragraphs 2, 3, 4, and 5 of the plaintiffs' Motion in Limine resulted in prejudice to the plaintiffs' as a matter of law and upon the further and additional grounds that the damages awarded by the jury, being the stipulated necessary and reasonable funeral bills of the plaintiffs' decedent and being less than the uncontradicted special damages proved by plaintiffs, are clearly inadequate as a matter of both law and fact. Plaintiffs urge the further and additional grounds that the Court's failure properly to instruct the jury to disregard the prejudicial testimony of West Virginia State Medical Examiner, Doctor Irvin Sopher with respect to the West Virginia State Motor Vehicle Standards for Intoxication and with respect to the said witness' opinions regarding the alleged high incidence of alcohol consumption in other boating and swimming fatalities directly resulted in ir-

remediable prejudice to the plaintiffs and directly resulted in the irrational and erratic verdict of the jury which exhibits both passion and prejudice, with respect to the issues of liability and damages. The plaintiffs further urge in support of their motion for a new trial that the jury's written question, directed to the Court, with respect to the issue of joint and several liability of the defendants, clearly demonstrates the willful refusal of the jury to follow the instructions of the Court with respect to assessing comparative negligence and determining damages. Further, the Court's failure to grant the plaintiffs' their requested cautionary instruction with respect to the testimony of Doctor Irvin Sopher and with respect to consumption of alcoholic beverages upon navigable rivers such as the Kanawha River further prejudiced the plaintiffs and irreparably tainted the jury's verdict, requiring that a new trial be granted upon the issues of both liability and damages as to Madison Coal and Supply Company, Inc., and Paul Kessinger.

Vickie Jean Ratliff Peck,
individually and as Administratrix of the Estate
of Holley Michael Ratliff

By Counsel

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APPENDIX C

[467] UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

VICKIE JEAN RATLIFF PECK,
etc.,

Plaintiffs,

vs. CIVIL ACTION NO. 82-3673

THE M/V MORRIS HARVEY,
et al.,

Defendants.

PLAINTIFFS' INSTRUCTION NO. 4

The Court instructs the jury that the master and pilot of the M/V Morris Harvey are presumed to have received a Coast Guard Notice to Mariners advising caution in transiting congested areas and advising the posting of a lookout on the front of their barges in transiting congested areas during the Labor Day weekened.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

VICKIE JEAN RATLIFF PECK, et al.

Plaintiff,

vs. Civil Action No 82-2441

THE M/V MORRIS HARVEY, et al.

PLAINTIFFS' REQUESTED CHARGE NO. 9

The Court instructs the jury as follows:

A vessel has a duty to keep a lookout and to watch where it is going and it is bound to observe reasonably visible conditions along the way and to notice what is before it for a reasonable distance, and if it fails to keep such a lookout or fails to watch where it is going or fails to notice what is before it for a reasonable distance, such failure constitutes negligence.

Furthermore, a vessel is under a duty to post a bow lookout; that is, a lookout who is stationed at the extreme forward point of the vessel and, in the case of a tug and tow, at the extreme forward point of the tow. Omission to perform this duty to post a bow lookout is so grave a default as to give rise to a strong inference that it contributed to the collision and to impose upon the vessel the heavy burden to show by clear and convincing evidence that its failure to post a bow lookout did not so contribute to cause the collision.

[468] Therefore, if you believe that the pilot of the M/V Morris Harvey, Clyde Hammack, Jr., failed to post a bow lookout or failed to watch where the Morris Harvey was

going or failed to notice what was before his tug and tow of barges for a reasonable distance and, as a result, that he and watchman Andrew Cogis failed to observe Paul Kessinger's pontoon boat before the collision occurred, then such failure, if any, constitutes negligence on the part of Clyde Hammack, Jr. * * * a preponderance of the evidence in this case that Clyde Hammack, Jr. was acting within the scope of his employment as employee of Madison Coal and Supply Company, and that such failure, if any, on the part of Clyde Hammack, Jr. proximately caused or contributed to cause the death of Holley Michael Ratliff, then such failure, if any, on the part of Clyde Hammack, Jr. constitutes negligence on the part of the defendant Madison Coal and Supply Company and if you further believe that such negligence, if any, proximately caused or contributed to cause the death of Holley Michael Ratliff, then you may find in favor of the plaintiffs and against the defendant, Madison Coal and Supply Company, Inc.

Myers v Union Pacific RR. Co., No 83-2586 (CA 8 decided 7/6/84) ____F2d ____

Chesapeake Bay Bridge and Tunnel District v Lauritzen (CA 4 1968) 404 F2d 1001 (headnotes 7 and 8) at pages 1001 and 1007

Anthony v International Paper Company
(CA 4 1961) 289 F2d 574 at page 581

Esso Standard Oil Company v Oil Screw Tug Maluco I
(CA 4 1964) 332 F2d 211

[471] IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

VICKIE JEAN RATLIFF PECK, etc., et al.
Plaintiff,

v. Civil Action No 82-2441

THE M/V MORRIS HARVEY, et al.

PLAINTIFF'S REQUESTED CHARGE NO 15

The Court instructs the jury that, in considering the testimony of Doctor Irvin Sopher and the other evidence and testimony in this case, there is no West Virginia law or regulation and no United States law or regulation which forbids or regulates the consumption of beer or other alcoholic beverage on a navigable river such as the Kanawha River, either by a passenger on a boat or vessel or by the owner or operator of a boat or vessel. In particular, the West Virginia motor vehicle laws have no applicability to a boat or vessel on the waters of the Kanawha River. Doctor Irvin Sopher was permitted to refer to the West Virginia motor vehicle laws regarding consumption of alcoholic beverages by the operators of motor vehicles merely for purposes of comparision or illustration and you should draw no inference whatsoever that such laws apply to Holley Michael Ratliff or any other passenger on Paul Kessinger's pontoon boat nor to Paul Kessinger himself, the owner and operator of the pontoon boat.

APPENDIX D

a) Origin of Broadcasts: Coast Guard Transmitter, Owensboro, Kentucky

b) "Due to the great number of recreational boats expected on the various rivers on the Labor Day weekend, especially in areas near cities, boat harbors and at the confluence of tributary rivers, commercial towboat operators are advised to transit these area with extreme caution. Operators should consider the use of a lockout at the head of their tows when transiting these areas."

c) By radio.

d) Transmissions:

Greenwich Time (2)		Local Time (CDT)	
August 30	1400-1404	August 30	0900-0904
August 30	1745-1757	August 30	1245-1257
August 31	0200-0213	August 30	2100-2113
August 31	1400-1405	August 31	0900-0905
August 31	1752-1756	August 31	1252-1256
September 1	0203-0209	August 31	2103-2109

f) Yes. 157.1 MHz (Channel 22)

APPENDIX E

[60] A. 10 or 12 feet.

Q. Okay, Now, what was, would be the normal height above the water of the Morris Harvey's pilot house back on August 1, 1980? A. I don't know her eye level.

Q. Do you know what the normal height of one of the decks on those motor vessel is? A. No, sir.

Q. Is it higher than 8 feet? A. Yes, sir.

Q. How much higher than 8 feet? A.I would have no idea.

Q. How big a blind spot, based on your experience, would you have expected the Morris Harvey to have, and I'm talking about a visual blind spot in front of that tow of barges, assuming that it was five empty barges in front of the Morris Harvey riding 10 feet out of river as you indicated, how long would you expect that that blind spot would have been in front of this lead barge back on August 31st, 1980? A. About 6 hundred feet, 7 hundred feet.

MR. MILLER: Your witness.

CROSS-EXAMINATION

BY MR. MILLER:

[61] about and asked you if there was anything unusual about it. And I believe you said any pilot would basically know that, or agreed with him any pilot would basically know that. That Notice or a very similar notice has been broadcast on previous Labor Day Weekends by the Coast Guard, had it not, sir? A. Yes, sir.

Q.And as a practical matter whether the notice had been broadcast or not advising the posting of a lookout on the front of a barge, you and other prudent pilots on the river

already knew that, didn't you? A. To post a lookout on the end of the barge.

Q. Yes, sir? A. In congested areas, yes.

Q. Yes, sir. Now, tell the jury what the purpose is of posting a lookout on the front of your tow of barges when you are passing through congested aras, why did you do that? Why does a prudent pilot do that? A. Because of your blind spot. They can see it, you can't.

MR. MILLER: No further questions.

RECROSS-EXAMINATION

BY MR. EMCH:

Q. Again, Mr. Simpkins, with respect to the broadcast that's been referred to, you didn't specifically remember that broadcast as we discussed? A. No, sir not word for word, no.

* * *

[152] * * * boat was located as you recall it. Could you label, if this is the Morris Harvey, would you label that Morris Harvey and would you label the front of the tow so we will know which is the front and which is the rear.

Now, were those jumbo or standard barges that you were pushing or was it a mixture of the two kinds? A. It was jumbos.

Q. Five jumbo barges? A. Yes.

Q. Tell the jury the dimensions, length and width, of a jumbo barge, if you would? A. 195 feet long and 35 feet wide?

Q.Each barge is 195 feet long and 35 feet wide? A. Yes.

Q. Now those barges were unloaded that night, is that right? A. I don't know when it was unloaded. We picked them up empty.

Q.You picked them up empty. And you were pushing empty barges? A. Yes.

Q . Do you know what the distance was from the water line to the deck of one of those barges? A. Probably somewhere around, you know, depending, you know, the middle of the barge somewhere around 10 feet.

Q. 10 feet from the water line to the deck?

* * *

[154] Q. Why not.

MR. EMCH: Mr. Miller has introduce the Morris Harvey and the barges in question, I don't think from my looking at those photographs that the drawing he has made is anywhere near an accurate representation.

Q. Mr. Hammock, by all means change my drawing in any way you wish to change it to make it as accurate as you recall it. But is it your testimony that you simply don't know what you height of eye was above the water line? A. There s really no way of telling.

Q. Why not? A. There is a lot of different things, why not.

Q. Mr. Hammock, you had three 195 foot barges out ahead of you and you are looking like that from some point either seated or standing and you can't see, just like you can't see what is in front of the hood of a car, you can't see what is in front of three, 195 foot barges for some distance. Do you know what blind spot means? A. Yeah.

Q. Well, without knowing your height above the water, how could you have calculated and known how many hundreds of feet your blind spot consisted of? A. I didn't.

Q. You didn't know what your blind spot

was? A. No, I didn't calculate it. I will give an estimate.

* * *

[156] Q. As a matter of fact, that's done when you're, when you have got a concern about what might be in that blind spot; isn't it? A. Sometimes it is.

Q.But you didn't do it that night? A. No, sir, I didn't.

Q. Isn't posting a lookout at the head of a tow normally done when transiting congested areas? Doesn't a careful pilot do that when he knows he's going through a congested area? A. Not necessarily.

Q. Why not? A. They just don't.

Q. Why not? A. I can't tell you why, they just don't.

Q. Wouldn't it been safer to have somebody looking down in that blind spot when you are going through congested areas with little boats crossing back and forth?

MR. EMCH: Objection. Obviously if the witness thought it was safer he would have done it.

THE COURT: Sustained.

MR. MILLER: Well let's ask him that.

MR. EMCH: Well I made an objection.

Q. Wouldn't it have been safer to have posted a lookout?

MR. EMCH: Same objection.

THE COURT: Well, sustained.

Q. Your search light, was your search light mounted on the [157] roof of the pilot house of the Morris Harvey back on August 31st, 1980? A. Yes.

Q. And that was even higher than your eye, wasn't it? A. It was above me.

Q. Do you know how high above water your search light was located? A. I don't remember, you know, I

hadn't been on the boat since it was like that, since it was like it was then and you forget these things.

Q. Did you ever know how high your search light was above water? A. Well she has got an eye level of somewhere around 19 feet, meaning to the top of the mast.

Q. 19 feet to the top of the mast? A. Or somewhere in that area, I believe that's what it is, I'm not real sure, but it's somewhere in that area.

Q. 19 feet to the top of the mast and somewhere below the top of the mast we are going to find the search lights, right? A. Probably.

Q. And somewhere down below the search lights we are going to find your eyeball, right? A. Uh huh.

Q. Now, would you say that the search light was mounted three feet higher than your eye?

* * *

[165] A. Could you state that again, please?

Q. Did you not know that you were going to find a lot of small boats on the river that weekend? A. I knew there would be, you know, quite a few boats up there.

Q. Mr. Hammock, I would like to hand you something that's a copy of something, and I would like to ask you if you know what it is? A. Un huh.

Q. What is it? A. It looks like a radio log book.

Q. And do you see what the dates are? A. Un huh.

Q. What is the date at the top? A. Where at, there.

Q. You got several dates on? A. 8-26.

Q. Of what year? A.'80

Q. And what is the next date down? a. 27th.

Q. And the next date down? A. 28th, 29th, 30th.

Q. Are those your signatures all up and down the page? A. Just mine?

* * *

[169] Q. Not even when you were passing the Levy? A. Not out at the head of the tow.

Q. After the collision did you radio the Coast Guard at Owensboro, Kentucky? A. I called the Coast Guard, Ohio River Bridge.

Q. Is that at Owensboro, Kentucky? A. I believe it is.

Q. And did you get through to them okay? A. Yes, sir.

Q. Did they get back to you okay? A. It seems like they did. I don't remember right off.

Q. Well you want to look at your log? A. I talked to them.

Q. You know you talked to them they talked to you and you told them about the collision? A. Yes.

q. Did you have any radío dead spots that interfered with reception? A. Where.

q. When you talked to the Coast Guard in Owensboro, Kentucky? A. Not that I remember, we didn't.

Q. No problems with reception? A. No, sir. Not that I remember.

Q. Performance good? A. When I was talking to the Coast Guard?

* * *

[170] Q. Go on? A. "And I didn't see them with headlight." And that's all it says.

Q. Okay. Is that just, does that mean exactly what it says they didn't appear in the screen and you didn't see them with the headlight. A. I didn't.

Q. Okay. And that's until after the collision? A. I didn't — I told you when I seen the boat, when it come around the front side of the barge.

Q. Okay. What does the next line say? A. "Witness David Estep St. Albans, MBC hours.

Q. What did you learn? A. That's not my writing.

Q. That is somebody else writing? A. The Captain was up there then and that's when Mr. Estep came over or something.

Q. Okay. Next line down from that, what does that say? Is that your signature. A. Yes, I don't really. I can't tell if it is or not.

Q. Do you remember whether you made it or not? A. I don't really remember right off. All it says, only thing it said was "watchman in pilot house" is what I'm getting at. I don't remember if I wrote it or not. It don't look like my writing, really.

* * *

[174] attention to what I was doing. So undoubtedly I was looking out the window, or –

Q. You were watching where you were going, weren't you? A. Yes, sir.

Q.And you never saw it even when you hit it? A. No. I told you the only time I seen the boat is when it come around the corner of the barge.

Q. Well, you know at some point that pontoon boat entered your blind spot, didn't it? Or do you know? A. I don't know if it did or not, Buddy.

Q. Well you couldn't see it when you hit it, could you? A. I never did see the boat. I just told you that I didn't.

Q. Until it came down along the starboard side of your tow? A. I didn't say that either.

Q. Well, did it come down the starboard side of your tow, Mr. Hammock? A. I don't know. It come around the corner the starboard corner of that barge. That's the first time I saw it.

Q. Okay. Did you talk to Bill Simpkins, another pilot of Madison Coal & Supply as you passed the Levy on the

radio? A. I tried to call him, but I don't think I ever talked to him.

Q. Do you know why you were trying to call him? A. Not right off, I don't.

MR. MILLER: Your witness.

* * *

[197] THE WITNESS: Nothing.

THE COURT: That settles that very simply.

BY MR. MILLER

Q. I believe on Mr. Emch' cross-examination you said the pilot has a lot more duties than running the boat. Running the boats is his main job. That evening before the collison, Mr. Hammack, among your other duties were you operating the throttles of the boat. A. I was running the boat.

Q. Were you operating its throttles? A. I was runing the whole boat.

Q. Were you operating its throttles?

MR. EMCH: Your Honor.

THE COURT: Well, its pretty obvious.

MR. MILLER: Well, let him say so.

THE COURT: I don't see any need of encumbering the record. It's pretty obvious he was piloting a boat and that involved the use of the throttle and steering mechanism. He said that several times. He was in charge of the boat and operating it.

BY MR. MILLER:

Q. Were you operating the search lights as well as the throttle and rudder? A. You don't have to operate the throttle. Once

* * *

[198] A. Yes.

Q. Mr. Emch asked you that evening if you were putting the boat where you wanted it to go. You saw a small

boat between the Elk River and the South Side Bridge, did you not, sir? A. Yes.

Q. And that boat was anchored in the channel, wasn't it? A. I don't know if he was anchored or not. He wasn't moving.

Q. He was out in the channel stationary? A. Yes, he was.

Q. And you stopped for him? A. Yes.

Q. And you had no trouble seeing him? A. No, I didn't.

Q. Where was he, port? Starboard? A. Kind of toward the port, if I saw him right.

Q. Who saw him first, you or Mr. Cogis? A. I did, as far as I remember.

Q. When you are putting a boat where you wanted it to go, did you want it to go over that pontoon boat?

MR. EMCH: I object.

THE COURT: Sustained, Sustained. That

* * *

[201] is your present degree? A. Yes, I have both a bachelors degree in economics, which I earned at the University of Buffalo, and a PHD in economics which I earned at Brown University.

MR. EMCH: Your Honor, I am certainly willing to stipulate Mr. Raymond's qualifications.

MR. MILLER: Well, your honor, if we just might briefly have him go through his background, just take a minute. The jury will then know who it is that is speaking to them?

Q. Briefly, Dr. Raymond, will you go through your educational background and your various posts that you have held up to and including your present post? A. Well, as I indicated, I went to the University

of Buffalo and got a bachelors degree from Buffalo in 1959, then went to Brown and received a PHD in 1963 and since that time I have attended post-graduate training programs at Stanford, MIT and participated regularly in professional meetings and conferences.

I taught first at Brown University for a year then one year at Colby College up in Maine and then I came to West Virginia and spent five years in Morgantown. I was an assistant professor and later an

* * *

[244] A. Yes, sir.

Q. Were, I may have asked you this, were both of them working that evening? A. Yes, sir.

Q. Okay. Did, to your recollection from the time that you switched up 2, 2 and 1 at St. Albans and started up on river, did the, from that point on did the Morris Harvey and its tow ever have to stop for any reason up until the collision? A. Yes, sir, one time.

Q. When was that? A. That would be below the Charleston Levy, sir.

Q. Was it below or above the Elk? It was between the Levy and the Elk River, sir.

Q. Do you remember what the reason was for stopping the tow at that point? A. Yes, sir, there was a pleasure cruiser was out in the middle of the river and just floating there with no lights on.

Q. Were you able to see the pleasure cruiser with no lights on out in the middle of the river okay? [245] A. Yes, sir.

Q. Was there light on the water from various sources? A. Yes, sir.

Q. Did the street lights along the banks of the river add to the reflection of light down on the surface? A. Yes, sir, they did.

Q. As far as you were concerned, was there adequate light to see by with the naked eye? A. Yes, sir.

Q. Were the weather conditions clear? A. Yes, sir.

Q. Any fog at all? A. No sir.

Q. No rain, no drizzel? A. No rain, no drizzel, sir.

Q. Did the pilot house have an air-conditioner on it? A. Yes, sir.

Q. Was it working that evening? A. No sir. It wasn't working. We were in the pilot house, we had both the doors out on the starboard side and the port side was open.

Q. Were any of the windows open?

* * *

[249] A. Yes, sir.

Q. Was there any kind of marker or buoy set up that evening to mark off those anchored boats all along that starboard side of the river? A. Yes, sir. There was on the starboard side.

Q. And that would be? A. That would be on the right hand side, sir.

Q. That would be on the right hand side? A. Yes, sir.

Q. What color were those buoys? A. They was white, sir.

Q. Do you know who placed them? A. No, sir, I don't know who placed them.

Q. Do you, from your experience on the river, do you know who would normally be the organization that would place buoys and channel markers and things like that? A. To my knowledge, that would be the U.S. Coast Guard or the Coast Guard Auxiliary.

Q. All right. Did the pilot of the Morris Harvey, Mr. Hammack, have to cut speed one or more times after he passed the mouth of the Elk River in addition to stopping

for the vessel with no lights anchored in the channel? A. Yes, sir.

[250] Q. Hows many times did he stop? A. He didn't stop. He cut back a little on his throttle about one time, sir.

Q. What was the reason for that? A. That's when we was passing up through the Levy there, sir.

Q. And what was the reason for cutting back? A. Because the pleasure cruiser boats, sir. They was zig zagging back and forth across the head of the boat.

Q. How would you characterize the conditions on the Kanawha River between the Elk and the C & P boat dock as compared to say normal river navigation, recognizing this is a Labor Day Weekend we are talking about. Would you say it was light, medium, congested or heavily congested? A. I would say congested.

Q. Do you, let me ask you this, did either you or, no I'm going to back that up again. During the period of time just before the Morris Harvey collided with the pontoon boat, where were you and what were you doing? A. I was, at the time I was up in the pilot house standing on the port side. And we was coming up the river past the Levy and on up, Mr. Hammack was * * *

* * *

[252] Q. Is that nautical miles per hour? A. Yes, sir nautical miles per hour.

Q. Tell the jury the difference between a nautical mile and a statute mile, what's the fractional difference? A. That sir, I couldn't say. As I said before, I wasn't trained to be a pilot or anything, so I just don't know. It's from what I heard.

Q. When somebody says that a vessel is going two to

three knots, are they referring to nautical miles per hour? A. Yes, sir.

Q. And when you say two to three you mean nautical miles per hour, is that right? A. Yes, sir.

Q. Did either you or Mr. Hammack to your knowledge see the pontoon boat before the collision took place? A. No, sir, we dind't.

Q. Now do you know from your own knowledge and from what you, yourself, saw and oberved either before or after the collision what part of the front or what part of your tow came in contact with that pontoon boat? A. From the, when we picked the pontoon boat * * *

* * *

[254] Q. Okay. And that was on your starboard side, that is the Kanawha, the MacCorkle Avenue side of the river? A. Yes, sir, Maccorkle Avenue.

Q. Where do you think the actual collision took place with respect to the C & P boat ramp and South Side Bridge, Mr. Cogis? A. That, sir, I couldn't say.

Q. Could you say whether it was above or below the point in the river where that houseboat was located? A. I would say it could have been above it, sir.

Q. Okay. You are not sure, though? A. No, sir, I'm not sure.

Q. Okay. Before the collision to your recollection were you operating or scanning the radar, was that part of your duties? A. No, sir, it was not.

Q. That was over on Mr. Hammock's side? A. Yes, sir. That was on the starboard side of the pilot house.

Q. And would normally, would you normally have

been expected to scan the radar without orders from the pilot to do that? A. No, sir.

* * *

[255] the question, the explanation why you saw it.

MR. MILLER: I'm sorry if I said that I didn't mean it.

Q. Let me ask the question again, because I'm not trying to confuse you. In your mind, Mr. Cogis, as an experienced deckhand of mature years, do you think you know why it was that neither you nor Mr. Hammack saw the pontoon boat before the collision took place. Neither one of you saw it was I understand? A. Yes, sir.

Q. Do you know or do you think you know why not? A. No sir.

Q. Do you think that it was in the blind spot of your tow? A.It's a possibility.

Q. But you were over to the port side? A. Yes, sir.

Q. And the collision took place on the starboard side? A. Yes, sir.

Q. It wasn't on your side anyway? A. NO, sir.

Q. It was on Mr. Hammock's side? A. Yes, sir.

[256] Q. And he normally would have been the one who would be responsible for observing up the starboard side and out in front? A. Yes, sir.

Q. Mr. Cogis, I would like to hand you a document and give you a chance to look at that, that's a piece of paper that was supplied to us by Madison Coal and Supply Company. I won't tell you what it's suppose to be, but you look at it and tell me if you think, you know what it is or is not? A. Yes, sir, I do.

Q. What is it, sir? A. It's safety regulations and what the duties are of the captain, pilot, engineer deckhands.

Q. Was that or something very very similar to that in effect on August 31st, 1980, if you know, to the best of

your recollection? A. To the best of my recollection sir, I think it was.

Q. Okay.

MR. MILLER: Mr. Emch is there any objection.

MR. EMCH: No.

MR. MILLER: May it be received.

THE COURT: All right.

* * *

[273] LT. ARNE HEGGERS, PLAINTIFF'S WITNESS, SWORN DIRECT EXAMINATION

BY MR. MILLER

"Q. Was the motor disassembled when you saw it? A. I believe the casting was missing."

MR. MILLER: Casing.

" Q. Did you determine if there were any lights on the pontoon boat? "A. We looked for lights, yes.

"Q. Were there any? "A. There were lights on the pontoon boat.

"Q. Did they work? "A. The testimony indicated —

Q. Well let me ask the question. Did you, yourself, make an investigation personally to determine if the lights worked on the pontoon? "A. Yes.

"Q. Did they? "A. Yes.

"Q. Where were the lights located that worked? "A. The only lights that worked were the running lights, the red and green at that time.

"Q. Okay. And did you inspect — in the inspection of the pontoon boat, did that take place as soon as you came on the scene? [274] "A. There abouts, correct.

"Q. And you can't remember if you inspected it before or after you talked to Hammack and Copus? "A. Right. I can't recall which took place first.

"Q. But would the questioning of Hammack, Copus and the inspect of the pontoon boat all have taken place within an hour after you had arrived? "A. It was one of the first things we did.

"Q. Okay. Did you question anyone to determine whether the lights of the motorboat had been worked on subsequent to the collison and before you inspected the pontoon? "A. Yes. We asked if anything had been touched or moved.

"Q. And what was the response? "A. No.

"Q. Who did you ask? "A. The people on the tow boat.

"Q. Okay. Did you ask Mr. Kessinger if the lights on his boat were working before the collision? "A. Yes.

"Q. What did he tell you? "A. He said that the lights were working, that the lights were off because they drained the battery.

"Q. But you were able, but the battery had recharged itself, I guess, when you went to check it? "A. Just cause it drains the battery doesn't mean — * * *

[275A] * * * reference to Mr. David Estep, I believe, correct me if I'm wrong, page 51. There are many references to he, and they are referring to David Estep. Is that correct?

MR. EMCH: Where are you?

MR. MILLER: Page 51. I believe that's Dave Estep. Kessinger, all right. This is with reference to Mr. Kessinger. Line 4

"Q. Did he volunteer any information to you on that point? "A. I didn't — I don't think he, you know, indicated that they were hit by or, you know, couldn't get out of the way and they were hit, you know. I don't know in his mind, I don't know if he could tell whether or not the tow slowed down or not from his perspective.

"Q. How fast was the Morris Harvey traveling at the time the collision occurred? "A. Slow.

"Q. How fast in miles per hour? "A. We estimated three miles per hour.

"Q. Is that speed on water or speed on land.

"A. That would be speed on land."

MR. MILLER: Page 54. Part of that is on the previous page, starts out

"Q. --statement on page 2, 'the visibility was relatively good due to the street lighting along both banks of the river?"

* * *

[277] "Q. Did it ever enter your mind as to why Copus or Mr. Hammack could not similarly see the pontoon boat? "A. Yes.

"Q. It did? "A. Sure.

"Q. And "Q. And did you conclude that they could not have been able to see it, that they should not have been able to see it as a silhouette? "A. Now what was your question?

"Q. Did you determine that they should, that Hammack and Copus should have been able to see the silhouette of the pontoon from the light? "A. Right. At the time the barge or at the time the pontoon boat would have been silhouetted the pontoon boat probably would have to be in the blind spot of the tow.

"Q. Did you ever make a determination as to why the pontoon boat was not picked up on the Morris Harvey's radar? "A. Radars are --"

MR. MILLER Continuing the next

"A. Yeah, we "A. Yeah. We determined that the radar was on by the statement and that it was on at the time we were there. But, you know, sometimes radars don't pick up everything."

MR. MILLER: Turn to page 74, Line 1.

[278] "Q. You got to the scene of the accident what time in the morning? "A. At daylight. I don't recall specifically the time.

"Q. When you got there you tested the lights on board Mr. Kessinger's boat and the red and green running lights were operative? "A. Correct.

"Q. And there was power in the battery to operate them? "A. Correct.

"Q. The dome light that you referred to in your prior testimony had been sheered off in the accident, had it not? "A. The canopy was torn loose and it was connected to the canopy.

"Q. So likewise the dome light had been sheered off? "A. I believe so, yes.

"Q. So far as the other lights like the dome light that might have been attached to a canopy, your indication previously that you didn't know whether they worked or not, that was because they were no longer attached to the boat, is that corrrect? "A. Correct. There was no way of checking them actually.

"Q. That's right. But the lights that were attached to the boat did, in fact, work? "A. Yes. Now as to whether or not they met the requirements of visibility, I can't attest to that.

"Q. What time of day on the 31st did you first see Mr. Kessinger * * *

[279] * * * river to call for help to get it towed out of the river before he saw or before the Madison barge came up the river? "A. No. He didn't request assistance of anybody.

"Q. That's what he told you? "A. Correct.

"Q. So that at no time before the barge came up the river shortly before the collision, at no time before that barge, the Morris Harvey came up the river, at any time

before that did Kessinger according to his testimony at no time did he request or ask for any assistance to get pulled out of the river? "A. He didn't. He wasn't aware of the danger he was in. And thereafter, you know.

"Q. He made no such attempt to get out? "A. Right.

"Q. Is that correct? "A. Correct.

"Q. You have been in the Coast Guard since 1976, Lieutenant? "A. Well, I was at the Academy for four years prior to that.

"Q. So you are a graduate of the Coast Guard Academy? "A. Correct.

"Q. And additionally you have been in active duty since your graduation in 1976? "A. Correct.

"Q. What is the purpose of putting a lookout up on the front [280] of a tow? "A. Specifically on the front of a tow?

"Q. In congested areas, congested boat areas what would be the purpose of putting a lookout on the front of a tow in a congested tow area? "A. A lookout's job is to report anything that would adversely affect the navigation of the vessel.

"Q. What would be the specific purpose of putting one on the front of the tow when you were pushing a bunch of barges rather than let your lookout stand in the wheel house? "A. Well under conditions of reduced visibility it helps because he's going to have that much farther he can see ahead.

"Q. In areas of heavily boat congestion at night, do tow boats pushing barges frequently put lookouts on the front of the tow? "A. I don't know."

MR. MILLER: Line 5.

"Q. As well as you are also familiar with the notice of mariners published by the Coast Guard for the 10th Annual Sternwheel Regatta, is that correct? "A. Correct.

"Q. At the time of this accident the special local regulations were not in effect? "A. Correct.

"Q. This river and the main channel at the time and place of the accident were governed by the general Coast Guard [281] regulations? "A. Correct.

Q. And there were no specific prohibitions put out by the Coast Guard or by anybody else to restrict boats from being in the river according to the usual practices and rules of the road, is that correct? "A. Correct."

MR. MILLER: Page 84, line 8.

"Q. All right. I understand and I want to make sure when you tested the running lights the red and green lights, there was sufficient energy at the present time in the battery to make those lights burn? "A. Correct. Now whether or not, like I say they met the requirements of the regulations as to distance and visibility, I don't know.

"Q. Right. And you did this but there was enough energy in the battery to make them light up and you to see this, even in the day time? "A. Right."

MR. MILLER: Page 89, line 7.

"Q. And do you recall the names of those Charleston policemen? "A. No. There is, no—"

MR. EMCH: Objection. May we approach the bench. Do we need to, Mr. Miller?

MR. MILLER: No, you are right. Okay.

* * *

[283] "A. No.

"Q. Did you? "A. No.

"Q. You didn't feel they were? "A. No.

"Q. Okay. That's your feeling today? "A. Yes."

MR. STEWART: Page 63, 10th line.

"Q. Did you ever make a determination as to why the pontoon boat was not picked up on the Morris Harvey radar? "A. Radars are — yeah, we determined that

the radar was on by the statements and that it was on at the time we were up there, at the time they were there but, you know, sometimes radar don't pick up everything."

MR. STEWART: Page 75, line 15.

"Q. So as a practical matter you have no way of knowing from your personal observation whether Mr. Kessinger was drunk or sober at the time of the incident?
"A. No.

"Q. He may very well have been drunk? "A. Maybe, I don't know."

MR. STEWART: Page 78, line 14.

"Q. What would be the specific purpose of putting one on the front of the tow if you are pushing a bunch of barges rather than let your lookout stand in the wheel house? [284] "A. Well, under conditions of reduced visibility it helps because he's going to have that much farther he can see ahead."

MR. STEWART: Page 86, line 30.

"Q. At the time that his sister", referring to Kessinger's sister, "got off and into the other boat, did he indicated whether or not at that time they had attempted to start the engine at any time earlier that day without success or motor, I should say? "A. He indicated they had a hard time starting the engine.

"Q. Did he state whether or not they had actually gotten it started earlier that day? "A. I don't recall.

"Q. But he did indicate to you that by the time his sister got off the boat and into the motorboat with the operator of it that he was aware that they were having trouble with the engine? "A. Correct."

MR. STEWART: That will be all. Thank you, Mr. Hegger.

MR. MILLER: This is Lt. Junior Grade Elmo Lee Alexander, United States Coast Guard, one silver bar.

PLAINTIFF'S WITNESS ELMO LEE ALEXANDER, SWORN

DIRECT EXAMINATION

BY MR. MILLER

MR. MILLER: Line 4 page 84.

[285] "Q. I have one more.

Going back to the answer about the right of way of the kind of vessels. I believe your answer was that a pleasure craft was not to impede the path of a larger boat. In the case of a smaller boat which is incapacitated and floating helplessly in the water, what is the duty of a larger boat that appraoches a smaller boat in this situation. "A. Okay. If the vessel is disabled and shows signs of being disabled, then every other vessel should try to keep as clear as they can of that vessel showing signs of distress or signs her inability to maneuver. There is specific lights and shapes and stuff.

"Q. If is disabled vessel has no lights or no means of producing lights, what the recommended way of showing distress? "A. If she has no lights to begin with and had no way of my producing my kind of light, she shall make herself known, you know, there is distress signals. There is a whole page of different signals that she can give, different hand signals, making sounding a whistle. There is a whole list of actions that she can take to make herself known.

"Q. Where would you find that list? "A. In the rules of the road.

CROSS-EXAMIANTION

BY MR. STEWART

"Q. If you know again, Lt. Alexander, operating a large * * *

* * *

[301] Q. Based upon all of the foregoing have you arrived at certain expert professional opinions regarding the effective causes of the collision of the MV Morris Harvey and the private pleasure boat West Virginia Number 7830 AB owned by Paul Kessinger in this case?

THE COURT: Let me see if I have your question back. You are saying the cause. The cause or causes.

MR. MILLER: Effective causes, Your Honor. I'm sorry if I said cause. I meant the effective causes.

Q. Have you arrived at such opinions? A. Yes, sir.

Q. What are those opinions? A. Well, the pontoon boat was a propelled vessel that was not capable of propulsion due to the fact they could not start the engine. It was drifting in the river. The tug and tow was up bound in the river. The tug and tow prior to getting to the South Side Bridge sighted an unlighted vessel and stopped for it, allowed it to get out of the way then proceeded further up the river, and for some reason did not sight the pontoon boat and proceeded up the river to the point of collision.,

Q. Do you have an opinion as to the effective cause or causes of that collision? A. Yes, sir, I do.

Q. What is that opinion? A. That the tug and tow failed to carry out the proper [302] lookout.

Q. Would you please explain to the jury the specific basis for your opinion that the MV Morris Harvey and its tow failed to maintain a proper lookout? A. The Coast Guard had broadcast a notice to mariners suggesting when vessels were transiting through crowded areas that they put a lookout at the head of a tow. This to my knowledge was not done and no attempt was made by the tow boat to look into the blind spot that they had in front of them at all times as they proceeded up the river.

Q. Captain Hofstra, have you prepared an illustrative

sketch to illustrate the blind spot which in your opinion existed between the MV Morris Harvey and its tow in the early monring hours of August 31st, 1980 immediately prior to this collision? A. Yes, sir, I prepared a rough sketch.

Q. I am going to hand you a document that's been marked as Plaintiff's Exhibit 23 for identification and I'll ask you if that is your sketch illustrating the blind spot? A. Yes, sir.

MR. MILLER: Mr. Emch, would you care to examine it here or would you like me to spread it out over there.

MR. EMCH: I don't care.

MR. MILLER: You want to examine it.

MR. EMCH: I would like to look at it.

MR. MILLER: Go ahead and explain to him, explain to

* * *

[303] A. Yes, sir.

Q. I didn't want the jury to think I am being unfair with you. Is it your contention, Mr. Hofstra, for the jury that a lookout on the head of the two would — I mean you are certain they would have seen the pontoon boats?

A. I have no knowledge of what they would have seen. The probability of their being capable of seeing is what I'm testifying to, sir.

Q. So they might have, Might have seen it? A. I presume that. They saw the other one.

Q. I mean a lookout on the head of a tow, is it your testimony that they might have seen it? A. My testimony is that the possibility exists for them to see it. If the man goes to sleep, he can't see it. If he's an alert lookout at the head of a tow, he should see it, yes.

Q. Okay. So you cannot testify that he would see it only that he should or he could? A. I believe I just answered that, sir.

Q. Is it your contention even if we see, if we assume that he would have, would have seen it, if there were a lookout at the head of the tow is it your contention that, in fact, they would have been able to avoid the collision? A. I believe so. I believe that the testimony that I have read in depositions and also others that they could stop this tow boat in 5200 feet.

[304] Q. Well, we were talking about how far they could see. Did you read the testimony about how close other people had to get to the pontoon boat who were right at eye level? A. Whose testimony are you talking about sir.

MR. MILLER: I don't know which testimony.

MR. EMCH: Assume there was.

MR. MILLER: Which testimony.

MR. EMCH: I am asking him to assume there was testimony in the case from people who were in boats on the water with the pontoon boat the hour or so before this accident who said that they had to get very close to it when it didn't have lights before they say it.

Q. Okay, would that change your view about how far the lookout would be able to see if you were out at the head of the tow. A. If you would like me to assume its pitch black and he can't see his hand in front of him, I will assume that, whichever you want me to assume.

Q. I only asked you to assume that people on the river said that they had to get very close. A. The testimony that I have read and the depositions I have read don't leave the impression in any way shape or fashion?

Q. And you won't assume that for me? A. I would assume anything you desire.

Q. Okay. And in that instance then, would that change your opinion of the ability of this lookout maybe to see a pontoon [305] boat in time to stop, say it was only 50 feet before he could see it? A. Then the testimony that I

have read that the vessel can stop within 50 to a hundred feet – it depends on whether it was 50 to a hundred feet. If it can stop in 50 feet and they saw it at 50, theoretically they would stop at the point of impact.

Q. Am I correct then, you haven't seen any testimony or haven't been told about any where it was stated by people on the river that they had to get very close to the pontoon boat before they could even see it? A. To my knowledge, I have read the testimony of all the witnesses to this collision. There is no testimony other than that, to my knowledge.

Q. The "very close" you do remember that? A. No.

Q. You don't remember that. All right. Is it your contention, Mr. Hofstra, with your diagram here that the pilot on board the Morris Harvey couldn't see in front of his tow? A. That's correct.

Q. I mean he couldn't see out here any where on the water in front of his tow? A. He cannot see an object on the surface of the water anywhere within that blind spot.

Q. Well, I'm talking about in front of the blind spot? A. In front of the blind spot he can see it, yes, sir.

* * *

[313] Q. Is this the Coast Guard report, Mr. Hofstra, that you reviewed? A. No. It's not the one that I reviewed.

Q. Well, have you reviewed a document with that information in it? A. Now it's beginning to look familiar.

Q. Did you review that? A. I believe so, yes, sir.

Q. Let me direct your attention refresh your recollection to this paragraph. Did the Coast Guard disagree with your computation of the blind spot? A. "Creating a blind spot ahead of the tow of about 650 feet."

Q. 650 feet. A. I don't know what he's talking

about. Is he talking about that the pontoon boat is going to disappear at 650 feet or is he talking a blind spot?

Q. I don't know? A. Neither do I.

Q. He didn't say the pontoon boat would disappear. The report says a blind spot of approximately 650 feet? A. Unqualified, yes, sir.

Q. And your testimony of the blind spot is 960 feet? A. Yes, sir.

Q. Is there any requirement to your knowledge, regulatory or otherwise, Mr. Hofstra, that requires the posting of a lookout * * *

* * *

[322] Q. Well, I will get back to the radar? A. Oh, okay.

Q. But the number was very close and, of course, it's a matter of eye level, which would also be determined by the height of the pilot and what have you? A. Oh, his height.

Q. The taller pilot — Did you then calculate on the basis of this information, and again using the tow with the five jumbo barges two by two and then one on the starboard side and the Morris Harvey faced up to that, did you calculate the blind spot at the head or the point of the head of the tow? A. Yes, I did. In regard to from where the pilot was standing out to the coning of the barge, which amounted to just right at 600 feet.

Q. Was the blind spot 600 feet? A. Very close to it. Very close to — that's where it started at the head of the tow, maybe 15 feet back towards the boat was the coning and the blind spot started there and went forward about 600 feet is what I came up with. But if you put the pontoon boat in there and the height that the pontoon —

Q. Which you assumed at what, how high did you assume the pontoon? A. I assumed the pontoon boat was some place between 9 and 10 feet, I used it as 9 feet,

trying to be conservative, and you should have been able to see the yellow top on that boat at 200 * * *

* * *

[350] A. Yes, sir. Unfortunately too many bodies with blood alcohol with a consideration, yes, sir.

Q. You do that very routinely? A. Yes, sir, as part of medical-legal death investigation.

Q. And have during all of the 8 years that you have been Chief Medical Examiner? A. Yes, sir, that is correct, yes, sir.

Q. Again, Doctor, let me ask you if you can characterize, based on your experience a .22 blood alcohol level to the jury? A. The .22 percent blood alcohol level would represent, can I use the reference to legal intoxication of a motor vehicle operator.

MR. MILLER: Your Honor, I object. May we approach the bench.

THE WITNESS: All right, sir. I will stay away from that.

THE COURT: All right. Go ahead and answer it, that will be all right.

THE WITNESS: It would be all right in that reference.

THE COURT: Yes, sir.

THE WITNESS: All right .22 percent represents over twice the amount of alcohol allowed under the law in the State of West Virginia whereby one can operate a motor vehicle without being considered impaired to operate such a motor vehicle. And that is if a person has point 10 percent, point [351] 10 percent or greater alcohol in their bodies while operating a motor vehicle, then they, if arrested and tried, are legally impaired and intoxicated to operate a motor vehicle, that is point 10 percent. In this particular, this is not a motor vehicle situation, but the blood showed an alcohol level in Mr. Ratliff of .22 percent, which is over twice as much alcohol in the blood of

Mr. Ratliff. And if he had been driving a motor vehicle, which, of course he wasn't, he wuld be considered intoxicated, to say the least.

Point 22 percent, to place another reference, would be roughly equivalent to let's say 15 cans of beer consumed over a 4 hour period. I'm not saying that this individual had, in fact, consumed 15 cans of beer in 4 hours, it might have been many more cans over 8 hours or it may have been a few less cans in two hours. But that is the magnitude of the type of alcohol level we are seeing, namely in the neighborhood of about 15 cans of beer over a 4 hour period, if one were to be able to consume that quantity of beer or on the other hand, 15 one ounce shots of whiskey in a 4 hour period.

MR. MILLER: Your Honor, at this point I will renew my objection and move the Court to ask the jury to disregard the references to the State of West Virginia Motor Vehicles Laws or in the alternative that the Court instruct the jury that those laws — there are no state or federal laws which pertaining to consumption of alcoholic beverages on the navigable water ways * * *

(3)

Supreme Court, U.S.
FILED
JUN 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1927

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VICKIE JEAN RATLIFF PECK, individually and as Administratrix of the Estate of HOLLEY MICHAEL RATLIFF, deceased, acting by and through his heir at law and Administratrix, VICKIE JEAN RATLIFF,
Petitioners,

vs.

THE M/V MORRIS HARVEY, M/V #265183, a registered diesel towboat, MADISON COAL AND SUPPLY, INC., a corporation, PRIVATE PLEASURE BOAT WV, 7380, AB, a registered small craft, PAUL KESSINGER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT MADISON COAL & SUPPLY, INC.'S BRIEF IN OPPOSITION

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43pp

QUESTIONS PRESENTED

1. Whether the sufficiency of the lookout maintained by a vessel is a question of fact to be determined under the attending circumstances.

2. Whether an expert witness can properly refer to a state 0.10% blood alcohol standard in a maritime wrongful death action in order to explain his testimony concerning the plaintiffs' decedent's level of intoxication.

PARTIES

The parties to this action are set forth in the petition. Madison Coal & Supply, Inc. is a wholly owned subsidiary of Port Amherst, Ltd.

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I. STATEMENT OF THE CASE

Petitioners' recitation of the "facts" leaves a great deal to be desired, primarily in the area of accuracy. This respondent will endeavor to present a fair indication of the pertinent facts as disclosed by the evidence in this case.

The petitioners' decedent, Holley Michael Ratliff, drowned in the Kanawha River around 2:00 a.m. on August 31, 1980. Immediately before his death and for a substantial period of time prior thereto, Mr. Ratliff had been drinking beer, and he and several others had been on board an unlighted pontoon boat, drifting in the river without power. Respondent's Appendix at 1a-9a. The pontoon boat was owned by the defendant Paul Kessinger, who was also aboard. The undisputed fact is that Mr. Ratliff had a blood alcohol level of 0.22% at the time of his death. Respondent's Appendix at 19a.

The Motor Vessel Morris Harvey, owned and operated by the defendant Madison Coal & Supply, Inc. (hereafter "Madison") was pushing a tow of barges up the Kanawha River, and the lead barge collided with the pontoon boat. All but one of the occupants of the pontoon boat jumped overboard just before the collision and Holley Michael Ratliff drowned as a result of jumping overboard. Respondent's Appendix at 18a. The weather at the time of the accident was clear.

Clyde Hammack, Jr. was piloting the Morris Harvey. Hammack was proceeding up the river at the slowest speed possible, with the radar on, using the searchlight, looking for other vessels. Respondent's Appendix at 11a, 13a, 14a.

Andrew Cogis was standing watch with Mr. Hammack at the time of the accident. Respondent's Appendix at 14a. Cogis, a watchman, was acting as a lookout in the pilothouse. Respondent's Appendix at 11a. Cogis was engaged in *no other activities, only that of lookout,* at and before the time of the accident. Respondent's Appendix at 14a. Respondent's expert witness testified that Cogis was stationed in the best possible location to act as a lookout, and that a lookout at the head of the tow would have been blinded by a searchlight. Respondent's Appendix 17a. The term "tow" refers to the string of barges in front of the towboat. The head of the tow simply refers to the forward portion of the lead barge.

There was conflicting evidence at trial regarding the amount of light reflected on the river by street lights in the area. *See* Respondent's Appendix at 2a. The uncontradicted testimony of several witnesses, however, was that you could not see the pontoon boat unless you were very close to it, and knew beforehand that it was there. Respondent's Appendix at 9a, 10a.

The plaintiff brought suit against numerous named parties, and the case went to trial against defendants Madison and Paul Kessinger. This matter was tried to a jury. The District Court heard lengthy argument on the proposed jury instructions and on all other legal issues presented throughout the trial. After six days of trial, the jury found the plaintiff's decedent, Holley Michael Ratliff, 75% negligent, the defendant Paul Kessinger 25% negligent, and the defendant Madison 0% negligent.

II. REASONS WHY THE PETITION SHOULD BE DENIED

A. THE FOURTH CIRCUIT'S HOLDING THAT THE DUTY TO MAINTAIN A PROPER LOOKOUT DOES NOT REQUIRE AS A FLAT AND UNYIELDING OBLIGATION THE POSTING OF A LOOKOUT AT THE HEAD OF THE FORWARD BARGE IS A CORRECT STATEMENT OF THE LAW, CONSISTENT WITH PRIOR FEDERAL CASES, AND DOES NOT RAISE IMPORTANT ISSUES NECESSARY TO BE DECIDED BY THIS COURT.

1. Petitioners' First Question Presented Misstates The Holding Of The Court Below, Demonstrates A Misunderstanding Of The Concept of "Statutory Fault", And Is Not Raised By The Decision Below.

The question presented by the petitioner is stated as follows:

> Whether failure to maintain a bow lookout in conditions of good visibility creates a mere rebuttable presumption of negligence as ruled by the Fourth Circuit, or constitutes statutory fault, as ruled by all other federal circuits.

Petitioners' question presented misstates the Fourth Circuit's holding, and miscontrues the concept of statutory fault. The question before the Fourth Circuit was whether there was an absolute duty to have a lookout at the head of the tow under all circumstances as a matter of law. The Court answered no, holding that the sufficiency of the lookout is a question of fact to be considered under the circumstances presented in each case. See Petitioners' Appendix at 4a. Contrary to petitioners' assertions, the Court did not hold that failure to post a bow lookout creates a re-

buttable presumption of negligence. The Court did state that a factual finding of failure to maintain a *proper lookout* (which may or may not involve a "bow" lookout) imposed a burden on the operator of the vessel to establish that such failure did not contribute to the accident.

Petitioners have never come to grips with the fact that a "proper" lookout is not equivalent to a bow lookout or a lookout in the head of the tow. To maintain a proper, adequate lookout is clearly a *legal duty* of good maritime navigation. However, the exact methods that must be employed in a given instance to meet that duty vary and are to be considered factually under the circumstances posed. Sometimes a "proper" lookout requires radar; sometimes a watchman; sometimes a watchman on the bridge, sometimes on the bow, sometimes both; sometimes a proper lookout requires all these things, or none of them. The point is that the *duty* is to maintain an *adequate* lookout, and it cannot be met by using a specific lookout in a specific location under all circumstances.

Petitioners assert that the Fourth Circuit's holding is inconsistent with the "statutory fault" rule. While it should first be noted that the Fourth Circuit's holding that the failure to maintain a proper lookout is not a statutory fault is correct in that this duty is not imposed by statute, *see* 33 U.S. § 221, petitioners' point still is nothing more than semantic. Under the *Pennsylvania* or "statutory fault" rule, where a vessel is in violation of a statutory rule intended to avoid collisions it is presumed to be at fault in a collision and has the burden of establishing that its fault did not contribute to the collision. *The Pennsylvania*, 86 U.S. 125 (1874). Thus the burden placed on one for

statutory fault is the same burden placed on one for failure to maintain a proper lookout, and even assuming *arguendo* that the Fourth Circuit should have considered failure to maintain a proper lookout a statutory fault, the analysis would still be the same and equally correct. The first step would be to find as a matter of fact that a proper lookout had not been maintained; such a finding was not made in this case. Next, whether called a "statutory fault" or just a "failure to maintain a proper lookout", the burden would shift to the vessel found to be delinquent; here again, since there was no underlying factual finding, the second step was never reached. The Fourth Circuit's analysis, however, was right in either event.

2. The Fourth Circuit's Holding That The Duty To Maintain A Proper Lookout Does Not Invariably Require The Posting Of A Lookout At The Head Of The Forward Barge Is Consistent With The Case Law Of This Court And The Other Federal Circuits.

The Fourth Circuit has consistently held for at least 55 years that a lookout does not invariably have to be placed at the head of the tow, and that the sufficiency of the lookout is a question of fact under the circumstances. *See, e.g., Anthony v. International Paper Company*, 289 F.2d 574 (4th Cir. 1961); *Columbia Dredging Co. v. New York P. & N. R. Co.*, 46 F.2d 988 (4th Cir. 1931). The Court's decision below is not a radical change in the law, and neither creates nor perpetuates a split of authority among the circuit courts.

In fact the Fourth Circuit's decision is consistent with the cases of the other federal circuits. For example in *Capt'n Mark v. Sea Fever Corp.*, 692 F.2d 163 (1st Cir. 1982) the First Circuit, citing *Anthony, supra*, refused to impose the requirement of a for-

ward lookout as a matter of law, and held that the adequacy of the lookout must be evaluated realistically in light of all the circumstances. *Capt'n Mark* at 166. *See also Pinto v. M/S Fernwood*, 507 F.2d 1327 (1st Cir. 1974). The Fifth Circuit cases are also very much in line with the Fourth Circuit's decision in this case below. The case of *Inland Oil & Transport Co. v. Ark-White Towing Co.*, 696 F.2d 321 (5th Cir. 1983) involved facts quite similar to those in the case at bar and the Court reached the same result that the Fourth Circuit reached in this case. *See also China Union Lines, Limited v. A. O. Andersen & Co.*, 364 F.2d 769 (5th Cir. 1966), *cert. denied*, 386 U.S. 933 (1967); *Cenac Towing Co. v. Keystone Shipping Co.*, 404 F.2d 698 (5th Cir. 1968).

The Second Circuit cases are also in accord with the decision herein. In *Moran Towing & Transp. Co., Inc. v. City of New York*, 620 F.2d 356 (2d Cir. 1980) the Second Circuit stated:

> The City has argued that the lookout was improperly positioned because he was not on the bow of the barge. Both the lookout and the mate testified that the lookout's station in the wheelhouse provided the best view and allowed the lookout to communicate easily with the mate. In view of all the circumstances, we find that the lookout was properly stationed in the wheelhouse. *See, e.g., Moran Towing & Transp. Co., Inc.*, 177 F.2d 607 (2nd Cir. 1952); *Columbia Dredging Corp. v. New York P. & N. R. Co.*, 46 F.2d 988 (4th Cir. 1931).

620 F.2d 356, 357 n.1.

Thus, contrary to the petitioners' assertions, the decision below clearly is not in conflict with the decisions of the First, Second, or Fifth Circuits, or any other circuit for that matter. While respondent concedes that there are cases which have found *in particular circumstances and as a matter of fact* that the lookout should be on the bow, there is no absolute rule that the lookout be on the bow *as a matter of law* regardless of the circumstances. A district court opinion from the Southern District of New York explains this point, which the petitioners have never been able to understand:

> There is authority in the *earlier cases* for the proposition that a lookout should be posted in the bow *especially if the visibility is poor, United States v. The Adrastus*, 190 F.2d 883, 886 (2d Cir. 1951). But the rule is not hard and fast... In the case at bar, defendants' expert witness Warren Harday, who has sailed as master on container ships such as the EXPRESS, testified that in clear visibility it is the practice on such vessels to post the lookout on the wings of the bridge rather than on the bow.

Granholm v. Vessel TFL Exp., 576 F. Supp. 435 (S.D.N.Y. 1983).

The plaintiff claims that several 19th century United States Supreme Court cases lay down a requirement for a bow lookout as a matter of law. The petitioners' interpretation of these cases is simply inconceivable in light of circuit court cases such as *Anthony, Capt'n Mark, Cenac Towing, Inland Oil* and *Moran Towing, supra*, which reject a duty to place a bow lookout as a matter of law, and hold the adequacy of the lookout

to be a question of fact. It is impossible to believe that these various circuit courts would flaunt the teachings of the Supreme Court, without even citing the cases the petitioners rely on.

What is far more likely, and in fact true, is that the petitioners' reading of these cases is wrong. The cases referred to by petitioners do not require a bow lookout under all circumstances. *The Ottawa*, 70 U.S. 268 (1866), the most frequently cited of the cases referred to by the petitioners, illustrates this point. The court in *The Ottawa* stated ". . . in *general* elevated positions are not so favorable situations as those *more usually* selected on the forward part of the vessel." 70 U.S. at 273. (emphasis added.) The use of the language "in general" and "usually" clearly indicates the absence of a hard and fast rule requiring a bow lookout as a matter of law, and the need to consider the circumstances of each particular case. *See also Haney v. Baltimore Steam Packet Co.*, 64 U.S. 287 (1860).

The Third Circuit's opinion in *The Mamei*, 152 F.2d 924 (3d Cir. 1945), *cert. denied*, 328 U.S. 836 (1946), clearly confirms this conclusion. In *The Mamei* the same contention made by the plaintiff in the case at hand was made and soundly rejected. The Third Circuit held in that case that *The Ottawa* did not require a forward lookout in all cases and that the question of the sufficiency of the lookout depended on the circumstances of each particular case. 152 F.2d at 929. The court went on to find that a lookout in the pilot house 365 feet from the lead barge was a sufficient lookout under the facts presented. *See also The Osaka Shosen Kaisha, Ltd. v. Elene*, 190 F. Supp. 201 (D. Md. 1961), *aff'd in part and rev'd in part*, 301

F.2d 59 (4th Cir. 1962) (lookout held to be question of fact and *The Ottawa* cited as authority). Clearly none of the cases relied on by petitioners require a bow lookout in all cases as a matter of law regardless of the circumstances.

The petitioners' assertion of a duty to maintain a bow lookout at all times is also contradicted by the Coast Guard Notice to Mariners on which petitioners so heavily rely. If there exists an absolute duty to have a lookout on the head of the tow, it would be quite strange for the Coast Guard, charged with the duty of enforcing the Rules of the Road, merely to recommend that mariners "should *consider* the use" of such a lookout, which is precisely what the Notice to Mariners did. Petitioners' Appendix at 18a. Furthermore, the testimony of petitioners' own expert, who testified that there is no rule or requirement mandating a lookout at the head of the tow, undermines petitioners' argument. Petitioners' Appendix at 4a.

Clearly the decision below is an accurate statement of the law consistent with the reported federal cases. The cases which petitioners cite stating the need for bow lookouts do not set forth a requirement to have a foward lookout as a matter of law. Rather, those cases found under the specific circumstances presented that there was a need to have a forward lookout. The Fourth Circuit thus properly held that there is not an absolute and unyielding obligation to have a bow lookout in every case regardless of the circumstances.

3. The Decision Below Does Not Present Any Important Questions Which Must Be Resolved By This Court.

Petitioners in this case were given a full and fair opportunity to present their arguments to a jury,[1] and

[1] Plaintiffs demanded a trial by jury in their complaint.

the jury rejected their arguments. The Fourth Circuit has done likewise. Petitioners now seek a third chance to present these arguments by petitioning this Court. Virtually all the arguments presented by the petition are factual arguments which have been properly addressed, rejected, reviewed, and rejected again. At this stage of the proceedings this respondent will not burden the Court with a discussion of the many inaccuracies and fallacies in these arguments. It is sufficient to note that these disputes simply do not raise issues of national importance which should be addressed by this Court. The unpublished per curiam opinion rendered below clearly indicates the lack of importance of this case to persons other than the parties.

B. ALLOWING DR. SOPHER'S REFERENCE TO THE WEST VIRGINIA INTOXICATION STATUTE FOR THE PURPOSE OF ILLUSTRATION WAS ENTIRELY PROPER AND RAISES NO IMPORTANT ISSUES WHICH NEED TO BE REVIEWED BY THIS COURT.

There can be no dispute that petitioners' decedent, with a scientifically established and uncontested blood alcohol level of 0.22%, was very intoxicated, and that his intoxication caused or contributed to his drowning. *See* Respondent's Appendix at 21a-24a. Dr. Sopher's reference to 0.10% blood alcohol was merely for illustrative purposes, and the jury was so instructed. Respondent's Appendix at 21a, 23a. The 0.10% blood alcohol level used as a standard in motor vehicle statutes has been referred to by analogy in many admiralty cases. *See, e.g., Reyes v. Vantage S.S. Co.,*

Defendants did not object to a jury trial, and a jury trial was had by consent. Federal Rule of Civil Procedure 39(c)

Inc., 609 F.2d 140 (5th Cir. 1980); *Schlichter v. Port Arthur Towing Company*, 288 F.2d 801 (5th Cir. 1961), *cert. denied*, 368 U.S. 838 (1961); *Palmer v. Ribax, Inc.*, 407 F. Supp. 974 (M.D. Fla. 1976); *Collins v. Indiana & Michigan Elec. Co.*, 516 F. Supp. 304 (S.D. Ind. 1981).

The trial judge's decision to allow reference to the 0.10% blood alcohol standard was clearly proper because it aided the jury in understanding Dr. Sopher's testimony. The ruling which petitioners seek to have this Court review was simply an evidentiary ruling, made in the heat of trial, as to whether the probative value of the reference outweighed any prejudicial effect. Federal Rule of Evidence 403. A reading of Dr. Sopher's testimony reveals the value of the reference in putting the decedent's intoxicated condition into perspective and illustrating the extent of his incapacitation. Respondent's Appendix at 20a, 21a. This ruling by its very nature depended on the particular facts of this case, and this simple evidentiary issue is not the type of question to which this Court should devote its resources.

III. CONCLUSION

The Fourth Circuit correctly ruled that there is no absolute duty to have a forward lookout as a matter of law in all circumstances. This ruling is in accord with the cases decided by the other federal circuits and this Court. The reference to the 0.10% blood alcohol standard was properly admitted to illustrate the medical examiner's testimony, consistent with the reported case law and the discretion customarily accorded to trial judges with respect to evidentiary matters.

The decision below, in addition to being correct on the merits, is not in substantial conflict with the decisions of the other circuits or this Court, does not depart from the accepted and usual course of judicial proceedings, and presents no important federal questions. For these reasons petitioners' request for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

CROSS EXAMINATION: ALPHONSE BARIA

* * * * *

Q. Was it displaying any lights of any kind?

A. Now in my deposition I said no.

Q. You said in your deposition?

A. That I did not see no lights, and I still have to say I can't remember no lights.

Q. None at all?

A. None at all.

Q. Mr. Ratliff knew someone on the pontoon boat?

A. Yes, sir.

Q. And that was Mr. Kessinger?

A. Yes, sir.

Q. He was the first one —Mr. Ratliff was the first one on to the pontoon boat?

A. Yes, sir.

Q. If I understand your direct testimony correctly you could not tell as he transmitted the bow of your boat to get on the pontoon boat whether any unsteadiness he had was as a result of the boat or could have been partly of result of his drinking?

A. Yes. Weight a minute—

Q. There was some unsteadiness?

A. There was some, yes.

* * * * *

DIRECT EXAMINATION: CARLOS BURDETTE

* * * * *

Q. Okay. Do you recall, do you recall whether the street lights along the river on the, along Kanawha Boulevard and along MacCorkle Avenue were lit that evening?

A. I really didn't pay any attention. You could see each other, so I guess that they were lit.

Q. You had plenty of light to see each other by?

A. Yes.

Q. Could you see other boats on the river?

A. Yes.

Q. Could you make out faces clearly from the light that you had?

A. You mean the faces on our boat.

Q. Yes. And other people's boat?

A. Not on other people's boat. You could on our boat.

Q. Okay. Now, about how long—what did you do after your boat drifted over to the Charleston side about the level of Broad Street?

A. We pushed off and went back out toward the middle.

Q. Who pushed it off?

A. Me and Bill Grealis.

Q. Then what happened?

A. We just drifted for a while.

Q. Then what happened?

A. We saw the barge coming.

* * * * *

CROSS EXAMINATION: CARLOS BURDETTE

* * * * *

Q. About a problem with the boat?

A. That's right.

Q. Mr. Burdette, when you came to the pontoon boat and during all the time after that when you were on it, did you ever see any lights on the pontoon boat?

A. I don't recall any.

Q. You never saw it display any lights at any time during this hour or so, is that correct?

A. Correct.

Q. Did the motor, was the motor operating when you came to the pontoon boat?

A. It was drifting.

Q. Was the motor ever operating during the time you were on it?

A. No.

Q. At any time did anyone suggest when the barges were approaching, suggest using a flare/ or any kind of signaling device?

A. No.

Q. No one mentioned that?

A. Not as I recall.

Q. You indicated that you do not recall seeing any lights on the barges?

A. No.

* * * * *

CROSS EXAMINATION: MARTHA CHAPMAN

* * * * *

Q. Do you recall also, Miss Chapman, talking with a gentleman, I believe his name was Mr. Lamp and giving a statement to him on the 5th of September of 1980, which was a few days after this accident, do you remember that?

A. I talked to two people after that.

Q. Do you remember signing that statement?

A. Yes.

Q. Do you remember signing a statement that says, "I don't know if Paul had any lights on in the boat. When I got off Paul's boat on to Pee-Wee's boat some of the guys were trying to get the motor started. The motor was never on while I was on Paul's boat." Do you recall that statement?

A. No, sir, I don't.

Q. You do recall giving a statement?

A. Yes.

Q. And signing a statement?

A. Yes.

Q. Miss Chapman, do I recollect your testimony correctly that during the time that you were out there that night there were a lot of boats anchored?

A. Yes.

* * * * *

DIRECT EXAMINATION: WILLIAM GREALIS

* * * * *

Q. When you came in contact with the pontoon boat, can you describe for the jury what it looked like?

A. Just—it looked like something flat with two, looked like, drums or something under, at the deck seat, and had a canopy thing on it.

Q. Do you remember what color the canopy was?

A. No, I don't.

Q. Do you remember what color the drums or pontoons were?

A. No, sir.

Q. Were you able to see it as you came up to it?

A. The pontoon boat?

Q. Yeah?

A. Yes, sir.

Q. Was there light enough on the river to see that boat and other boats as you cruised along?

A. Yes.

Q. Did you observe as you came up to the pontoon boat whether it was displaying any lights?

A. No it wasn't.

Q. Now, did you board the pontoon boat?

A. Yes, I did.

Q. Who else got on board it?

A. Derwin Parker, Mike Ratliff, Darnell Burdette and myself.

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* * * * *

Q. His boat. And you approached the pontoon boat?

A. Yes.

Q. You indicated that you saw it, but it didn't have any lights on it?

A. Yes.

Q. Do you know how far away from it you were when you first saw it?

A. No.

Q. Were you fairly close?

A. I would say yes.

Q. Now when you first got up to the pontoon boat there were three people on it?

A. Yes.

Q. Do you know any of their names? Mr. Grealis was one a woman?

A. Yes. It was a woman.

Q. Was one a younger fellow and one an older fellow?

A. Yes.

Q. Do you know what the older fellow was doing?

A. I'm sorry.

Q. Do you know what the older fellow was doing when you came up to the pontoon boat?

A. He was laying on one end of the boat.

* * * * *

CROSS EXAMINATION: WILLIAM GREALIS

* * * * *

Q. Did you find any others?

A. What we found, I took to be a piece of an oar.

Q. Did you find any other kind of flotation devices of any kind?

A. No.

Q. There were no life jackets?

A. No. None that I saw.

Q. Did anyone come on board the pontoon boat wearing a life jacket?

A. No.

Q. Was there alcohol or alcoholic beverages on the pontoon boat, Mr. Grealis?

A. I did see some beer bottles on the pontoon boat.

Q. And you all spent probably more than an hour drifting in the boat before the accident?

A. Probably, yes.

Q. Was the motor—did they ever get the motor started?

A. No.

Q. Were you aware at any time, any time from the time you came up to the pontoon boat until the accident that it ever had any lights on it at all?

A. No.

Q. No lights?

A. No.

* * * * *

DIRECT EXAMINATION: ROBERT HILL

* * * * *

Q. And did it start?

A. No. It did not start.

Q. Had there been any problems starting the engine before that to the best of your knowledge?

A. Not to the best of my knowledge, no.

Q. Where was the pontoon boat located in the river at the time you first learned the barges were coming toward you?

A. Well we was right about the C & O Bridge there.

Q. Do you remember where you were with respect to the center line of the river?

A. Not right correct, no. We was right there at the C & O Bridge.

Q. Were there street lights along either side or both sides of the river at the point where the boat was located when you first saw those barges?

A. Well, I don't remember.

Q. Was there any light on the river?

A. Not to my knowledge.

Q. You remember whether the lights on your nephew's boat were burning at the time you saw those barges?

A. Yes, they was.

Q. Which lights do you specifically recall?

A. Well, he had two bow lights on the front and back lights on the back up about three foot, and he had an overhead dome

* * * * *

CROSS EXAMINATION: PAUL KESSINGER

* * * * *

Q. Is it your understanding or down that small pleasure crafts such as yours under ordinary circumstances give way to a larger vessel, like a tow?

A. Yes, sir.

Q. The big vessel has the right of way?

A. Yes, sir, it does.

Q. Are you aware also in a situation where two vessels are approaching at an angle that the vessel to the right, to the starboard side has the right of way?

A. I thought you passed starboard to—

Q. You pass port to port?

A. Port to port, yes, that's correct.

Q. So whichever way I turned, the vessel that has—the other vessel to the right gives way?

A. Yes, sir.

Q. On the evening in question, Mr. Kessinger and on the afternoon in question, you and others that were on your pontoon boat had had alcohol to drink, had you not?

A. Yes, sir. We had been drinking beer.

* * * * *

CROSS EXAMINATION: DAVID ESTEP

* * * * *

Q. The first time you didn't see anything when you looked out?

A. I don't think I did.

Q. Did you ever at any time that you were watching, even after you identified a boat, did you ever see any lights on that boat?

A. No.

Q. No lights displayed of any kind?

A. No.

Q. Could you even tell much about the boat, color or anything like that?

A. No.

Q. Now there was some lighting back here on the Capitol street side so that you were looking from water level toward the boat with some back lighting?

A. Right.

Q. And still all you saw or could make out was a silhouette at most?

A. Right.

Q. This was on the second occasion?

A. The first time, of course, I couldn't see anything.

Q. Couldn't see anything?

A. And the second time before they were illuminated I could see a silhouette. I thought it was a pontoon boat the way it . . .

* * * * *

DIRECT EXAMINATION: CLYDE HAMMOCK, JR.

* * * * *

Q. But you don't remember whether there was or wasn't?

A. Right. Right off, I don't.

Q. And if there had been a ghost on the radar so that you couldn't count on it, what would you have done?

A. I had my search light on.

Q. Okay. And what kind of system were you following in checking with your search light?

A. I was running slow, you know, looking.

Q. Did you have, did you have any help in scanning the radar and operating the search light from Mr. Cogis or anybody else that night?

A. Could you say that again, please.

Q. Well, did you have any help in operating the search lights or looking at the radar screen that night from Mr. Cogis or anybody else?

A. No. I looked at the radar, the search light and everything myself.

Q. Did it all yourself?

A. Yes.

Q. Where was Mr. Cogis stationed that night?

A. He was in the pilot house.

* * * * *

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* * * * *

Q. Somewhere around two to two and a half or three mile per hour?

Q. Okay, now, in order to move that tow at two, two and a half or three miles an hour did you need to run those engines the full throttle or were you at reduced?

A. I was slowed back.

Q. Does that mean throttle back?

A. As slow as they could run.

Q. When you reversed your screws, did you give more power to the engine but just backwards so they were trying to pull the boat backwards instead of frontward?

A. I don't really remember. I just remember backing her up, you know.

Q. Well, what would be standard practice to do if you suddenly find yourself in a collision situation and you are going forward at two and a half miles per hour, wouldn't your normal practice be to throttle, reverse the engines and give them maximum throttle backwards?

A. Well, not necessarily it wouldn't.

Q. Why not?

A. Well, you know I can't really remember why I backed it full a stern then or not. I just don't remember.

* * * * *

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* * * * *

Q If there was a twist of some kind, were you correcting for it?

A Naturally I was, you know.

Q Cause the boat was going where you wanted it to go?

A Yes.

Q Did you have any trouble maneuvering the boat?

A No.

Q That evening?

A None at all.

Q So, again, on whatever question might be questioned of you, assuming twists or a sudden gust of wind or anything like that, you drove the boat, didn't you?

A Yes, sir.

Q You were putting it where you wanted it to go?

A Yes.

Q As you maneuvered up the river that evening, Junior, what power setting were you using?

A Power setting, you mean as far as.

Q On the engines?

A Just the first, the first notch is kind of like the controls, you know, you just push them up and there is one notch, you know that's idle, like slow bell.

Q Is that the lowest power setting on your throttle that starts the proper turning?

A Yes.

Q It's the slowest you can set the boat to go?

A Yes, the first one.

Q If you pulled it back from that notch you would disengage the props?

A Yes. You would be in neutral.

Q So it's the first notch up there?

A Yes, it's, you know, something like a notch, it's just where you just shove it up and it kind of like catches, sort of.

Q Is that the setting you use when you are transiting harbors or cities or whatever?

A Well, that's slow bell and that's, you know, that would be, that's about the best that you could do.

Q In some harbors or in daylight or other conditions you might go a little faster than that?

A Oh, yeah you will be working her.

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CROSS EXAMINATION: ANDREW GOGIS

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Q Mr. Cogis, tell the jury what kind of pilot Junior Hammack was in your opinion back in August of 1980?

A As a pilot and as a young pilot, I think Junior Hammack was one of the best young pilots that I ever worked for. He was very cautious. He would, when we go in landing and everything he always went in at a slow pace, never banged the barges around and always on the lookout for his crew. And I can honestly say if I had a chance to work with him again, I sure would like to work with him.

Q Is he what you call a gentle pilot in his handing of the boat?

A Yes, sir.

Q On the night in question as you were coming up river, you were in the pilot house?

A Yes, sir.

Q With Junior. From the Elk River or Blaine Island or somewhere in that vicinity up until the point where the collision apparently occurred, did you have anything that you were doing other than being in the pilot house and looking out for other boats and assisting the pilot in clearing?

A No, sir.

Q Was that the only thing you were doing?

A Yes, sir.

Q Did you have anything to aid you?

A Yes, sir. I had a pair of binoculars.

Q How were you using those?

A I was using them as following the spotlight when it goes from port to starboard and from starboard to port, when he was searching back and forth.

Q The boat that you encountered before the South Side Bridge, down around the Levy, did Junior pick that up in the spotlight?

A Yes, sir.

Q You saw it in the spotlight and you stopped?

A Yes, sir.

Q What did the boat do?

A The boat, Junior killed it out and he stopped. The boat just stood there and then when Junior blew the horn, whether they was sleeping or what was going on is not to my knowledge, I don't know, but finally he woke up and started the engine and then his lights, his green light and red light on the boat there that he had on there, it came on and he proceeded to get out of the way?

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Q You talked about the height of these barges from the water line. Might you be two or three feet off? I'm not suggesting that you are, I'm just asking you if you had measured them or if that's an estimate?

A Yes, sir, it's a possibility.

Q Was the radar working and was it on?

A Yes, sir.

Q Did it appear to you, based on your limited experience, that it was showing the banks and things as you went up?

A Yes, sir.

Q The banks of the river?

A Yes, sir.

Q You know basically what it looks like when it's working?

A Yes, sir, I do.

Q You also mentioned the conditions, there were other boats around during this time of night. Was this a good time to go through there, 2:00 o'clock a.m.?

A To my knowledge, it was, sir.

Q And better probably than the previous afternoon or something?

A Yes, sir. Sure would be.

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DIRECT EXAMINATION: ARNE HEGGERS

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"Q. And you can't remember if you inspected it before or after you talked to Hammack and Copus?

"A. Right. I can't recall which took place first.

"Q. But would the questioning of Hammack, Copus and the inspect of the pontoon boat all have taken place within an hour after you had arrived?

"A. It was one of the first things we did.

"Q. Okay. Did you question anyone to determine whether the lights of the motorboat had been worked on subsequent to the collision and before you inspected the pontoon?

"A. Yes. We asked if anything had been touched or moved.

"Q. And what was the response?

"A. No.

"Q. Who did you ask?

"A. The people on the tow boat.

"Q. Okay. Did you ask Mr. Kessinger if the lights on his boat were working before the collision?

"A. Yes.

"Q. What did he tell you?

"A. He said that the lights were working, that the lights were off because they drained the battery.

"Q. But you were able, but the battery had recharged itself, I guess, when you went to check it?

"A. Just cause it drains the battery doesn't mean—

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DIRECT EXAMINATION: JOHN BEATTY

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Q. You would have had the lookout where he was in the pilot house?

A. Exactly.

Q. Would you explain to the jury why that is where you would have put it?

A. Well, the reason being that any time you have a man or a deck crew out on decks on a tow, any time that you turn the search light on regardless of which way they are facing, whether they were facing the light or facing the head of the tow or looking out across the tow, it will bother their eyes to the point that they can't see anything. They are not even capable of safely walking back to the boat until you turn that light out. It will definitely blind you. And—

Q. Are you saying that, Mr. Beatty because you have been out there?

A. Very definitely I have been out there.

Q. Would it have been safe in your opinion to have proceeded up river in Charleston that evening without using your search light?

A. No. You have to do that to make your presence known. You have to use your search light so that—you're much better off to have it on, at least they know you are out there some place.

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DIRECT EXAMINATION: IRVIN SOPHER

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Medical Examiner, anything about the body in your examination of it that would indicate to you that this man was unconscious at the time that he died?

A. There is no reason from the outside examination of the body to expect that the man was unconscious at the time that he died, no, sir. The cause of death was drowning. This gentlemen had a large white, what we call a mushroom cap, c-a-p, mushroom cap of foam from the nostrils and mouth and this is a pathologic sign of drowning in a body that is found or recovered from a body of water. So the cause of death in this case is drowning.

Q. Dr. Sopher, did you draw a blood sample from the body of Holley Michael Ratliff?

A. Yes, sir.

Q. And did you examine that blood sample?

A. Yes, sir.

Q. Did you examine that blood sample from the standpoint of determining what the blood alcohol level was in that body?

A. Yes, sir.

Q. What were the results of that test?

A. The blood alcohol level was 0.22 percent as noted on the second page of the report. 0.22 percent, that is a little over two tenths of one percent of alcohol in the blood.

Q. Dr. Sopher, in your opinion, what the blood alcohol level of Holley Michael Ratliff at the time of the drowning?

A. The blood alcohol level of Mr. Ratliff at the time of his drowning would have been approximately that same figure, that is 0.22 percent of blood alcohol at the time that he drown and died.

Q. And so that the jury may put that testimony into some sort of perspective, Doctor, will you tell them please, what in your experience, for example, is the medium level of blood alcohol found in fatal auto accident drivers?

MR. MILLER: I object, Your Honor. I would like to approach the bench on this.

(Bench conference among counsel and Mr. Kessinger.)

MR. MILLER: Your Honor, it's, I'm sure the basis for my objection is obvious. What possible bearing does the medium alcohol level in an automobile accident have to do with a boat accident. I know there has been—

MR. EMCH: I will withdraw the question.

MR. MILLER: Thank you.

(Proceedings resumed.)

Q. Dr. Sopher, in your experience can you characterize to the jury what 0.22 means. Is that high, low, average?

MR. MILLER: Objection, unless he lays a proper foundation for the question, Your Honor.

Q. All right. Dr. Sopher, do you have occasion in your capacity as Chief Medical Examiner to examine a large number of bodies in which blood alcohol is an important consideration?

A. Yes, sir. Unfortunately too many bodies with blood alcohol with a consideration, yes, sir.

Q. You do that very routinely?

A. Yes, sir, as part of medical-legal death investigation.

Q. And have during all of the 8 years that you have been Chief Medical Examiner?

A. Yes, sir, that is correct, yes, sir.

Q. Again, Doctor, let me ask you if you can characterize, based on your experience a .22 blood alcohol level to the jury?

A. The .22 percent blood alcohol level would represent, can I use the reference to legal intoxication of a motor vehicle operator.

MR. MILLER: Your Honor, I object. May we approach the bench.

THE WITNESS: All right, sir. I will stay away from that.

THE COURT: All right. Go ahead and answer it, that will be all right.

THE WITNESS: It would be all right in that reference.

THE COURT: Yes, sir.

THE WITNESS: All right .22 percent represents over twice the amount of alcohol allowed under the law in the State of West Virginia whereby one can operate a motor vehicle without being considered impaired to operate such a motor vehicle. And that is if a person has point 10 percent, point 10 percent or greater alcohol in their bodies while operating a motor vehicle, then they, if arrested and tried, are legally impaired and intoxicated to operate a motor vehicle, that is point 10 percent. In this particular, this is not a motor vehicle situation, but the blood showed an alcohol level in Mr. Ratliff of .22 percent, which is over twice as much alcohol in the blood of Mr. Ratliff. And if he had been driving a motor vehicle, which, of course he

wasn't, he would be considered intoxicated, to say the least.

Point 22 percent, to place another reference, would be roughly equivalent to let's say 15 cans of beer consumed over a 4 hour period. I'm not saying that this individual had, in fact, consumed 15 cans of beer in 4 hours, it might have been many more cans over 8 hours or it may have been a few less cans in two hours. But that is the magnitude of the type of alcohol level we are seeing, namely in the neighborhood of about 15 cans of beer over a 4 hour period, if one were to be able to consume that quantity of beer or on the other hand, 15 one ounce shots of whiskey in a 4 hour period.

MR. MILLER: Your Honor, at this point I will renew my objection and move the Court to ask the jury to disregard the references to the State of Wet Virginia Motor Vehicles Laws or in the alternative that the Court instruct the jury that those laws—there are no state or federal laws which pertaining to consumption of alcoholic beverages on the navigable water ways of the country, including the Kanawha River. I feel the risk of prejudice is so great here, Your Honor, that I make the motion that the jury be so instructed at this time.

THE COURT: Well, the Doctor, I think was using that to illustrate the degree of intoxication or apparent intoxication, and overruled.

All right, you may continue.

MR. EMCH: Thank you, Your Honor.

Q. Dr. Sopher, in your capacity as Chief Medical Examiner again, do you have occasion to examine bodies that have, where the person has become deceased in what might be called a recreational drowning incident.

A. Yes, sir. Many, many such cases.

Q. Do such cases in your experience, Doctor, or if you can do it this way, what percentage of such cases involve excessive use of alcohol?

MR. MILLER: Objection, Your Honor. Absolutely no reason to bring that into this case. It has no bearing on the material issue.

THE COURT: Sustained.

MR. MILLER: Thank you.

Q. Dr. Sopher, was Holley Michael Ratliff, in your opinion, intoxicated at the time of his death?

A. Yes, sir. It was obvious that he was severely intoxicated at the time that he died.

Q. In your opinion, I'm sorry—are you finished?

A. Yes. He was markedly intoxicated, yes.

Q. In your opinion, if you have one, Doctor, would a man that exhibited a .22 blood alcohol level be impaired?

A. There is no question that a person with this level of alcohol in his blood would be severely impaired in terms of any motor activity performance test, in any perameter that one would—

Q. By motor activity, what do you mean?

A. That would be muscular coordination, ability to react, reflex time, thought processes, judgment, visual recognition. This kind of alcohol is, is extremely elevated and does absolutely no one any good in any kind of a, either a thought process situation or performance situation.

Q. Would a .22 blood alcohol level, Doctor, in your opinion affect your breathing reflexes?

A. Yes. Could very well cause a problem.

Q. Doctor, in your opinion given your examination of the body of Holley Michal Ratliff, as you have discussed, is it

likely that this man's blood alcohol level had at least an effect or was a cause of his drowning?

MR. MILLER: Object to the form of the question, Your Honor. He hasn't laid a proper foundation. The question itself is not properly asked.
Q. Do you have an opinion, Dr. Sopher, based upon your examination and your experience as a medical examiner.

A. Yes, I would have an opinion on this.

MR. MILLER: Renew my objection. The question has not been properly asked. No proper foundation has been laid.

THE COURT: Well, overruled. All right, you may answer.
A. Let's me say this. We see good swimmers who drown in normal situations all the time. And a common denominator in those deaths is an elevated level of blood alcohol. That is—and considerably lesser levels than seen in the body of Mr. Ratliff. This is a scenario that may be that of a 20, 25 year old individual swiming across the lake, have been attending a picnic or just out having a party, good swimmer and he never reaches the opposite side.

MR. MILLER: Your Honor, at this point I am going to note that the Court has already, I have already objected and the Court has already sustained my objection to referring to investigations of other drowning accidents. And Mr. Emch is clearly violating the Court's ruling, and I will ask there be a cautionary instruction and Mr. Emch be cautioned to observe the rulings of the Court.

MR. EMCH: Your Honor, I'm sorry.

THE COURT: The Doctor was using that only by way of illustration. The jury will understand that.
Q. I would ask simply for your opinion, Doctor, relative to Mr. Ratliff?

A. In my opinion, I think what could be said is that certainly the high level of alcohol found within the body of Mr. Ratliff did not serve him in any positive fashion in his plight that particular evening. Whether this man would have survived his drowning episode had he not been drunk, I think is tough to say. I cannot necessarily say that. In other words, I could not say that had he not had a .22 percent alcohol or had he had a lesser degree of alcohol that he definitely would have survived. But we do see death due to drowning with much lesser levels of alcohol wherein there is not even a situation of a collission involved as our history shows in this particular case.

MR. EMCH: Thank you, Doctor.

CROSS-EXAMINATION

BY MR. MILLER:

Q. Doctor, I believe that your office also performed the—

MR. EMCH: Objection, Your Honor. May we approach the bench.

MR. MILLER: I haven't finished my question, Your Honor.

MR. EMCH: I would like to approach the bench.

(Bench conference with Court, counsel and Mr. Kessinger.)

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